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Supreme Court of the United States

PROGRESS ENERGY, INC.,

Petitioner,

v.

BARBARA TAYLOR

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals erred in holding, in conflict with the Fifth Circuit and the formal position of the U.S. Department of Labor, that a Department of Labor regulation, 29 C.F.R. 825.220(d), unambiguously and validly precludes the private settlement or release of claims under the Family and Medical Leave Act of 1993, 29 U.S.C. 2601 *et seq.*

CORPORATE DISCLOSURE STATEMENT

Petitioner Progress Energy, Inc. has no parent corporations, and no publicly held company owns 10% or more of its stock.

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In the Supreme Court of the United States

No. 07-___

PROGRESS ENERGY, INC., PETITIONER

v.

BARBARA TAYLOR

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

Progress Energy, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals on rehearing (App., *infra*, 1a-20a) is reported at 493 F.3d 454. The original opinion of the court of appeals (App., *infra*, 21a-44a) is reported at 415 F.3d 364. The order of the district court (App., *infra*, 45a-65a) is unreported.

JURISDICTION

The court of appeals entered its judgment on July 3, 2007. The court denied rehearing on August 24, 2007 (App, *infra*, 66a-67a). This Court has jurisdiction under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS

The relevant statutory and regulatory provisions are reproduced at App., *infra*, 70a-91a.

STATEMENT

Respondent sued petitioner, her former employer, for alleged violations of the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. 2601 *et seq.*, notwithstanding her prior release of those same claims as part of a severance agreement. After twice reviewing the question, a divided panel of the Fourth Circuit held that a Department of Labor regulation forbids the private settlement or release of FMLA claims. In so holding, the court of appeals rejected a contrary decision of the Fifth Circuit and the Department of Labor's official interpretation of its own regulation.

The court of appeals' ruling not only creates a conflict in the circuits and displaces an established agency position, but also calls into question the validity of countless similar waivers adopted by employers and employees within the Fourth Circuit and elsewhere. In addition, the court's decision directs federal courts and the Department of Labor to devise and implement procedures and legal standards for approving any waiver or settlement of an FMLA claim without any statutory or judicial guidance for that task. The decision thus threatens to impose new and significant burdens on the judiciary and the federal government that cannot be alleviated absent review by this Court.

1. The FMLA gives eligible employees a statutory right to take up to twelve weeks of unpaid leave annually due to personal illness or the need to care for a parent, child, spouse, or other immediate family member with a serious health condition. 29 U.S.C. 2612. Among other things, the FMLA protects employees' positions and benefits during the period of

leave and generally gives employees a right to reinstatement or equivalent employment upon their return to work. 29 U.S.C. 2614. Section 2615 makes it "unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided" by the FMLA. 29 U.S.C. 2615.

Congress charged the Secretary of Labor with investigating alleged violations of the FMLA and with bringing actions to enforce the statute's provisions. 29 U.S.C. 2616, 2617. Congress further vested the Secretary with authority to "prescribe such regulations as are necessary to carry out" the Act. 29 U.S.C. 2654. Pursuant to that authority, the Secretary of Labor promulgated a regulation to implement Section 2615's prohibition on employers' interference with employees' exercise of their rights under the FMLA. The regulation provides that "[e]mployees cannot waive, nor may employers induce employees to waive, their rights under FMLA." 29 C.F.R. 825.220(d).[1]

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[1] Subsection (d) of the regulation reads, in full:

> Employees cannot waive, nor may employers induce employees to waive, their rights under FMLA. For example, employees (or their collective bargaining representatives) cannot "trade off" the right to take FMLA leave against some other benefit offered by the employer. This does not prevent an employee's voluntary and uncoerced acceptance (not as a condition of employment) of a "light duty" assignment while recovering from a serious health condition (see § 825.702(d)). In such a circumstance the employee's right to restoration to the

2. Respondent Barbara Taylor is a former employee of Carolina Power and Light Company (CP&L), which is a subsidiary of petitioner, Progress Energy, Inc. According to the allegations of the complaint, which have been accepted solely for purposes of the district court's summary judgment decision, App., *infra*, 22a-23a, 53a, Taylor was employed as a data management assistant by CP&L. In 2000, she underwent extensive medical tests and procedures to evaluate swelling in her leg. She alleges both that CP&L failed to properly credit all of her leave as FMLA leave, and that she received poor performance evaluations over the course of her illness because of her health-related absences. *Id.* at 23a-25a, 46a-47a. Taylor's requests that CP&L correct her performance evaluations based on her alleged entitlement to FMLA leave allegedly were denied by the company. *Id.* at 24a-25a.

In 2001, CP&L underwent a reduction in force and laid off a number of employees, including Taylor. App., *infra*, 48a. As part of that reduction, CP&L offered Taylor various benefits, including seven weeks of paid administrative leave and monetary compensation, in exchange for executing a general release and severance agreement that encompassed any FMLA claims. *Id.* at 25a. Taylor agreed and, in exchange for $11,718 in extra compensation, released CP&L

> same or an equivalent position is available until 12 weeks have passed within the 12-month period, including all FMLA leave taken and the period of "light duty."

29 C.F.R. 825.220(d).

and Progress Energy "from *all* claims and waive[d] *all* rights" she had arising from her employment under any "federal, state or local law." *Id.* at 25a-26a, 50a-52a.[2]

3. Two years after signing the release, Taylor filed suit against Progress Energy asserting violations of the FMLA. The district court granted summary judgment for Progress Energy. App., *infra*, 45a-65a. Adopting the reasoning of the Fifth Circuit in *Faris* v. *Williams WPC-I, Inc.*, 332 F.3d 316 (2003), the district court held that the relevant Department of Labor regulation, 29 C.F.R. 825.220(d), prohibits only the prospective "bargaining away" of FMLA rights, App., *infra*, 59a, and thus allows the knowing and voluntary release of claims asserting past violations of the FMLA, *ibid.* The court stressed that "serious issues of judicial economy would be raised if" the regulation were read to "eviscerate the ability of parties to settle any FMLA disputes." *Id.* at 61a; see *ibid.* ("[I]t would appear that the only way any FMLA claim could ever be settled would be for the plaintiff to file suit and for the parties to induce the court to sign a consent judgment.").[3]

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[2] The severance documents afforded respondent 45 days to review the terms of the agreement and encouraged respondent to seek the advice of counsel before signing. App., *infra*, 51a, 63a.

[3] The district court also rejected Taylor's argument that her waiver was not knowing and voluntary, concluding that she had failed to produce any evidence creating a genuine issue of material fact on that question. App., *infra*, 62a-63a.

4. The court of appeals reversed. App., *infra*, 1a-20a, 21a-44a. The court issued two opinions, both of which concluded that the Department of Labor's regulation forbids the settlement of FMLA claims without the prior approval of either the Department or a court.

a. In its initial opinion, App., *infra*, 21a-44a, the Fourth Circuit held that the Department of Labor's regulation "prohibits both the prospective and retrospective waiver of any FMLA right (whether substantive or proscriptive) unless the waiver has the prior approval of the [Department of Labor] or a court." *Id.* at 31a. The court considered its decision to be compelled by the regulation's plain language and what, in the court's view, the Department of Labor had "said it intended the provision to mean" in adopting the regulation. *Id.* at 33a. The court further stated that the Department of Labor had "recogni[zed] that the FMLA's enforcement scheme is meant to parallel the [Fair Labor Standards Act]," under which rights "cannot be waived or settled without prior [Department of Labor] or court approval." *Id.* at 34a. Finally, the court held that, in light of congressional "silence on the question of waiver" of FMLA rights, *id.* at 39a, the regulation is "based on a 'permissible construction' of the FMLA," *id.* at 43a (citing *Chevron USA Inc.* v. *Natural Res. Defense Council, Inc.*, 467 U.S. 837, 843 (1984)).

b. Progress Energy filed a petition for rehearing en banc, and the Department of Labor filed a brief as *amicus curiae* in support of Progress Energy's petition. The Department explained that the court had misunderstood its regulation, which the Department interprets to permit the type of retrospective

settlement or waiver of FMLA claims made by Taylor here. See DOL C.A. Amicus Br. 1-15.

The court of appeals granted panel rehearing, App., *infra*, 68a-69a, and, by a divided vote, reinstated its prior holding, *id.* at 1a-20a.

The majority acknowledged that its holding conflicts with the Department of Labor's interpretation of its own regulation, but concluded that the Department's position was "inconsistent with the regulation" and thus was not entitled to deference. App., *infra*, 4a. In the majority's view, "the plain language" of the regulation "precludes both the prospective and retrospective waiver of all FMLA rights, including the right of action (or claim) for a past violation of the Act." *Id.* at 3a. Accordingly, the majority held that the regulation's "prohibition on the waiver of rights includes a prohibition on the waiver of claims." *Id.* at 6a. The court added that the waiver or settlement of FMLA claims would be permitted only if the waiver or settlement were separately approved by a court or by the Department. *Id.* at 17a.

In so holding, the majority refused to defer to the Department's position in light of what it perceived to be inconsistencies between the agency's interpretation and the regulatory history. App., *infra*, 13a-16a. The majority also concluded that permitting the private resolution of FMLA claims would "undermine Congress's objective of imposing uniform minimum standards," analogizing the Department's regulation to a statutory restriction on the settlement of certain claims under the Fair Labor Standards Act, 29 U.S.C. 201 *et seq.* App., *infra*, 11a.

With respect to the burden imposed by the court's requirement of prior Department or court approval of

every private resolution or release of any FMLA claim, the court expressed "confiden[ce] that both the DOL and the courts will work diligently to deal with these cases in a prompt and efficient manner." App., *infra*, 16a.

c. Judge Duncan dissented. App., *infra*, 17a-20a. In her view, the majority should have deferred to the Department of Labor's construction of its own regulation because the majority's position was not "compelled by the language of the regulation." *Id.* at 19a. She noted that "[t]here are few words in the legal lexicon more ubiquitous and freighted than the term 'right,'" and reasoned that "the elasticity of the term 'right'" made it ambiguous whether the phrase "'right under FMLA' on its face subsumes accrued causes of action." *Ibid.* She thus would have deferred to the Department of Labor's interpretation of its own regulation. *Id.* at 19a-20a (citing *Auer* v. *Robbins*, 519 U.S. 452 (1997), and *Long Island Care at Home, Ltd.* v. *Coke*, 127 S. Ct. 2339 (2007)).

REASONS FOR GRANTING THE PETITION

As the court of appeals itself acknowledged, its decision squarely conflicts with the Fifth Circuit's contrary holding that the Department of Labor's regulation permits the retrospective release of FMLA claims. The Fourth Circuit's decision also rejects the Department's longstanding interpretation of its own regulation. At the same time, the court's decision saddles that Department and the federal courts with a new, judicially minted obligation to superintend potentially tens of thousands of private releases and settlements in FMLA cases each year – a duty that has no footing in the statutory or regulatory text, history, or precedent. The court of appeals' construction

of that broad impediment to private settlements and releases also contradicts precedent from this Court enforcing the strong public policy in favor of the private resolution of claims. The court's decision has called into question the viability of private settlements of FMLA claims within the five States composing the Fourth Circuit, and it has introduced substantial uncertainty nationwide regarding the ability of employers and employees to reach voluntary, peaceful, and secure closure in employment relationships. Only this Court can restore uniformity to the law and stability to the business environment by correcting the court of appeals' repudiation of the widespread and beneficial practice of privately resolving FMLA claims – a practice specifically endorsed by the agency that Congress charged with administering the FMLA.

I. The Courts Of Appeals Are Divided Over The Proper Application Of A Federal Regulation That Applies To Employers Nationwide

There is a significant and recurring disagreement among the federal courts over whether a Department of Labor regulation forbids the retrospective release of FMLA claims arising out of disputes over past employment practices. As relevant here, the regulation provides that "[e]mployees cannot waive, nor may employers induce employees to waive, their rights under FMLA." 29 C.F.R. 825.220(d). As one court explained, "[a]lthough the pertinent [regulatory] language is only fourteen words in length, courts have spent thousands in trying to settle on its meaning," and "the result has been a lack of consensus among the federal courts as to the correct interpretation of

Section 825.220(d)." *Dougherty* v. *TEVA Pharms. USA, Inc.*, Civ. No. 05-2336, 2007 WL 1165068 (E.D. Pa. Apr. 9, 2007) (permitting waiver).

The court of appeals' decision in this case squarely and expressly conflicts with the holding of the Fifth Circuit in *Faris* v. *Williams WPC-I, Inc.*, 332 F.3d 316 (2003), that the same Department of Labor regulation permits the release of FMLA claims. The employer in *Faris* provided a terminated employee with compensation in exchange for a release of any federal-law claims arising out of the employment relationship. *Id.* at 318. After accepting the additional compensation and signing the waiver, the employee nevertheless sued the employer under the FMLA. *Ibid.*

The Fifth Circuit held that the release barred the employee's lawsuit. *Faris*, 332 F.3d at 322. Reading the regulation as a whole and in light of the "public policy favoring the enforcement of waivers," the Fifth Circuit concluded that the regulation is most naturally read to "prohibit[] [the] prospective waiver of rights, not the post-dispute settlement of claims." *Id.* at 321. The court further noted that its reading was consistent with case law permitting similar waivers under analogous statutes regulating the employment relationship, such as Title VII, 42 U.S.C. 2000e *et seq.*, and the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.* See 332 F.3d at 321. The court of appeals could conceive "of no good reason * * * why the government would proscribe waiver for FMLA * * * claims and yet favor waiver of claims for age discrimination under ADEA and for civil rights under title VII." *Id.* at 322. In the Fifth Circuit's view, if the Secretary of Labor had intended "such a

departure from the policy employed in analogous areas, one would expect the Secretary would have manifested this intent forthrightly." *Ibid.*

There is no dispute that the decisions of the Fourth and Fifth Circuits are in direct conflict. The court of appeals here twice acknowledged it. App., *infra*, 6a-8a, 17a (recognizing the difference in outcomes in the two cases and reinstating the original decision disagreeing with the *Faris* decision); *id.* at 36a ("[W]e therefore disagree with the Fifth Circuit's analysis."). The Fifth Circuit allows the retrospective release of FMLA claims; the Fourth Circuit forbids it. Accordingly, had this case been filed in Texas, Mississippi, or Louisiana, the outcome would have been exactly the opposite, and the release would have been sustained.[4]

The decisions of district courts are also in conflict, which substantially heightens the legal instability confronting employers and employees. See *Dougherty*, 2007 WL 1165068 (permitting waiver).[5]

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[4] Two other courts of appeals have enforced the settlement of FMLA claims without addressing the Department of Labor's regulation. See *Halvorson* v. *Boy Scouts of America*, No. 99-5021, 2000 WL 571933 (6th Cir. May 3, 2000); *Schoenwald* v. *Arco Alaska, Inc.*, No. 98-35195, 1999 WL 685954 (9th Cir. Aug. 30, 1999).

[5] See also *Brizzee* v. *Fred Meyer Stores, Inc.*, No. 04-1566, 2006 WL 2045857 (D. Or. July 17, 2006) (following the Fourth Circuit and forbidding waiver); and *Dierlam* v. *Wesley Jessen Corp.*, 222 F. Supp. 2d 1052, 1055-56 (N.D. Ill. 2002) (forbidding waiver).

II. The Court Of Appeals' Decision Conflicts With Decisions Of This Court

A. In rejecting the Secretary of Labor's expert interpretation of her own regulation, the court of appeals failed to heed this Court's repeated admonition that an agency's construction of its own regulation is "controlling unless plainly erroneous or inconsistent with the regulation." *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997). This Court reiterated just last Term the importance of such deference, given the Department of Labor's "thorough knowledge of the subject matter" of the statutes it administers and its "ability to consult at length with affected parties." *Long Island Care at Home, Ltd.* v. *Coke*, 127 S. Ct. 2339, 2347 (2007); see *id.* at 2349 (citing, *inter alia*, *Auer*).

The court of appeals declined to defer to the Department of Labor's interpretation because the court considered the regulation's meaning to be plain and the Department's position to be inconsistent with the regulatory history. App., *infra*, 3a-16a. That was wrong. To begin with, the fact that other courts have read the regulation's language to mean "plain[ly]" the opposite is strong evidence that the text is at least ambiguous. See *Faris*, 332 F.3d at 321 ("A plain reading of the regulation is that it prohibits prospective waiver of rights, not the post-dispute settlement of claims."); *Dougherty*, 2007 WL 1165068, at *6 n.19 ("the plain text of Section 825.220(d) permits an employee to waive past FMLA claims").

Moreover, as Judge Duncan explained (App., *infra*, 19a), the term "rights" is freighted with ambiguity both in this regulation and generally in the law. See *DiBiase* v. *SmithKline Beecham Corp.*, 48 F.3d 719, 729 (3d Cir.), cert. denied, 516 U.S. 916 (1995);

United States v. *Patrick*, 54 F. 338, 348 (C.C.M.D. Tenn. 1893) ("The words 'rights' or 'privileges' have, of course, a variety of meanings, according to the connection or context in which they are used."); compare *Dennis* v. *Higgins*, 498 U.S. 439, 447-448 (1991), with *id.* at 452 (Kennedy, J., dissenting) (disagreeing over the meaning of the term "right" in 42 U.S.C. 1983).

The Department's resolution of that ambiguity by drawing a distinction between "rights," which cannot be surrendered prospectively, and post-event "claims," which can be released or settled, is reasonable because a "claim" is distinct from a "right." A claim is a mechanism for asserting that a legal right exists and that it has been violated. Indeed, the Department of Labor's distinction not only is reasonable, but also closely tracks this Court's decision in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974). In *Alexander*, this Court held that, although "there can be no prospective waiver of an employee's rights under Title VII," an employee "presumably * * * may waive his cause of action under Title VII as part of a voluntary settlement." *Id.* at 51-52.

The court of appeals reasoned (App., *infra*, 5a-6a) that the "rights" that an employee may not waive under the regulation must include the procedural "right" to assert existing FMLA claims. But the language does not compel that conclusion. Employees equally have the procedural "right" to resolve an existing FMLA claim through a settlement or release. An ordinary – indeed, necessary – incident of exercising one's right to press a claim is exercising the right to compromise that claim. Thus, by granting employees an individual cause of action under the FMLA, Congress necessarily granted employees all of

the ordinary attributes of a cause of action, including the discretion to compromise a claim. To hold otherwise would require the unlikely conclusion that Congress wanted to force employees to choose between either ignoring violations of their rights altogether or pressing them unyieldingly against their employer for years. The Department of Labor's careful distinction between prospective rights and the retrospective waiver of litigation claims sensibly avoids that dilemma.

B. The Fourth Circuit's view that the Department of Labor's position has "evolv[ed]," App., *infra*, 6a, likewise provides no basis for withholding deference. First, the agency's view has been consistent. The Department has never stated that the retrospective waiver of FMLA claims is forbidden and, as the Department itself explained to the Fourth Circuit in its *amicus* brief in this case, the Department's litigation position has consistently distinguished between the prospective waiver of rights and the retrospective waiver of claims. See Dep't of Labor C.A. Amicus Br. 2 n.2. Further, the court of appeals' reliance on the murky regulatory history, App., *infra*, 13a-16a, mistakenly perceived a change in position based not on a prior agency statement, but on an "inference[] from agency silence." *Dougherty*, 2007 WL 1165068, at *6 n.20.

In any event, even if the Department of Labor's position had "evolv[ed]," App., *infra*, 6a, this Court reaffirmed just four months ago that an agency's "change in interpretation alone presents no separate ground for disregarding the Department's present interpretation." *Long Island Care*, 127 S. Ct. at 2349. The court of appeals' decision thus squarely conflicts

with this Court's precedent governing deference to an agency interpretation of its own regulation.

C. The court of appeals' decision also disregards this Court's cases enforcing the strong public policy in favor of permitting the private resolution of disputes. This Court has stressed that courts should not conclude that a law or regulation forecloses such private resolution unless that prohibition is compelled by statutory text or purpose. See *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) ("[I]f Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history."); see also *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991); *Local Number 93, Int'l Ass'n of Firefighters* v. *City of Cleveland*, 478 U.S. 501, 515-516 (1986) (Congress intended "voluntary action" to be the "preferred means of achieving the objectives of Title VII"); *Carson* v. *American Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981) ("In enacting Title VII, Congress expressed a strong preference for encouraging voluntary settlement of employment discrimination claims.").

By giving short shrift to the established policy favoring private dispute resolution, the court of appeals' decision makes the FMLA an outlier in the law and is at odds with this Court's precedents, which have recognized that comparable employee claims under other federal laws can be waived. See *Gilmer*, 500 U.S. at 26-29 (private resolution of claims under the Age Discrimination in Employment Act); *Gardner-Denver*, *supra* (permitting waiver of claims under Title VII); *Local Number 93*, 478 U.S. at 515-516 (Ti-

tle VII); cf. *Clayton* v. *International Union, UAW*, 451 U.S. 679, 692 (1981) (noting "the national labor policy of encouraging private resolution of contractual labor disputes"); *O'Shea* v. *Commercial Credit Corp.*, 930 F.2d 358, 361 (4th Cir.) (waiver of ADEA claims), cert. denied, 502 U.S. 859 (1991); *Runyan* v. *National Cash Register Corp.*, 787 F.2d 1039, 1041-1043 (6th Cir.) (same), cert. denied, 479 U.S. 850 (1986).

The court of appeals' break from Title VII's model is particularly incongruous because the FMLA is designed, in large part, to supplement Title VII in combating gender discrimination in the workplace. See 29 U.S.C. 2601; *Nevada Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721 (2003); 60 Fed. Reg. 2180, 2218 (Jan. 6, 1995) ("FMLA provides the same sorts of protections to workers who oppose, protest, or attempt to correct alleged violations of the FMLA as are provided to workers under Title VII.").

The Fourth Circuit analogized the FMLA to the Fair Labor Standards Act (FLSA), which has been interpreted to restrict private waivers. App., *infra*, 10a-12a. That comparison is misplaced. To begin with, this Court has not held that the FLSA flatly proscribes the private resolution of any claim that might arise under that Act. This Court has held only that questions concerning an employer's coverage and the duty to pay overtime wages under the FLSA may not be waived. See, *e.g.*, *D.A. Schulte, Inc.* v. *Gangi*, 328 U.S. 108, 114-116 (1946); *id.* at 114-115 (reserving the question whether other claims under the FLSA could be waived); *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697, 707-710 (1945). Unlike what the Fourth Circuit now has done with the FMLA, this Court has not held that every right – substantive and

procedural – and every claim under the FLSA is immune to waiver.

Furthermore, this Court has explained that the FLSA's restriction on waivers is rooted in the unique "private-public character" of the right to minimum wage and hours limits. *O'Neil*, 324 U.S. at 709. More specifically, this Court has explained that the FLSA restricts waivers because the Act was itself a response to the "unequal bargaining power as between employer and employee," which led to the need for "compulsory legislation to prevent private contracts" that would endanger the physical "health and well-being" of workers. *Id.* at 706. Forbidding waiver would also prevent employers from "gain[ing] a competitive advantage by reason of the fact that [their] employees are more willing" to work for reduced wages. *Id.* at 710.

The FMLA does not share that unique history, and the knowing and voluntary release of FMLA claims does not trigger those same concerns. While the FMLA promotes important public policies, see *Hibbs, supra,* the FMLA's provisions are not grounded in a premise of health-endangering inequality in bargaining power. The FMLA instead is rooted in principles of workplace equalization and gender equality – similar to the policies that underlie Title VII and the Age Discrimination in Employment Act, which permit releases and settlements. Furthermore, the FMLA's protections are triggered by a variety of individual circumstances, and the scope of the rights applicable in any given case is determined by those same individual circumstances. The FMLA's protections thus do not implicate the across-the-board and workplace-wide concerns reflected in

the FLSA's minimum wage and hour provisions. Nor do alleged violations of the FMLA's individualized protections give rise to concerns about businesses illicitly obtaining a competitive advantage.[6]

The Fourth Circuit's decision thus stands alone in the deep inroads it makes against the public policy favoring private resolution of disputes. The court's decision also lacks any footing in the FMLA itself, where Congress prohibited only "interfer[ing] with, restrain[ing], or deny[ing]" the exercise of FMLA rights. 29 U.S.C. 2615. Indeed, given the strong presumption in favor of permitting private dispute resolution, the structure and purposes of the FMLA, and the lack of any textual basis for broadly proscribing

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[6] The court of appeals noted (App., *infra*, 39a-40a) that the Secretary had analogized the FMLA to the FLSA in the preamble to the regulations. That is true, but it changes nothing. The Secretary said only that the regulation's ban on waivers of rights reflects "sound public policy" under the FMLA just as it does under "other labor standards statutes such as the FLSA." 60 Fed. Reg. at 2218. And the Secretary's position that FMLA rights may not be waived does fully advance sound public policy. What the Secretary did *not* say – but the court of appeals mistakenly inferred – was that the Department intended to handcuff the FMLA to the FLSA for all interpretive purposes. Nor did the Secretary suggest that the FMLA itself is rooted in the same public policy concerns about unequal bargaining power and unfair competitive advantage that underlie the FLSA's distinctly restrictive limitation on private waivers and releases of claims. The FMLA does not share that same history and, as noted by the Secretary just a few paragraphs earlier in the preamble, the FMLA also bears many structural similarities to Title VII, *ibid.* – a statute under which private waivers and releases of claims are not only permitted but encouraged, see, *e.g.*, *Carson*, 450 U.S. at 88 n.14.

private releases or settlements, the sweeping regulatory prohibition on releases or settlements discerned by the Fourth Circuit here would exceed the Department's regulatory authority under the FMLA. Cf. *Ragsdale* v. *Wolverine World Wide, Inc.*, 535 U.S. 81 (2002).

D. Perhaps recognizing the unworkability of its sweeping exclusion of FMLA claims from private resolution, the Fourth Circuit held that private waivers and settlements are permitted if approved by either the Department of Labor or a court. App., *infra*, 16a-17a. That aspect of the decision, however, stands established principles of agency deference on their head. Having read the purportedly "plain" language of the regulation to reject the Department of Labor's own interpretation of its regulation, *id.* at 4a, the court proceeded to craft out of thin air its own codicil to the regulation – an unwritten provision that enlists federal courts and the Department in superintending countless private FMLA settlements and waivers, and that consigns settling employers and employees to navigating a newly minted and as-yet-undefined process of regulatory or judicial approval. If principles of agency deference mean anything, they mean that a court cannot reject an agency interpretation based on "plain language" while simultaneously penning new regulatory language of its own. Cf. *SEC* v. *Chenery Corp.*, 318 U.S. 80, 88 (1943) (a "judicial judgment cannot be made to do service for an administrative judgment").

In short, in addition to creating an inter-circuit conflict, the court of appeals' decision has departed so far from this Court's established principles of administrative law and is so disruptive to the established

public policy favoring private resolution of disputes as to warrant this Court's review.

III. The Question Whether FMLA Claims Can Be Waived Is One Of Recurring And Pressing Importance

This Court's review is critical because of the far-reaching implications of the court of appeals' decision and the substantial instability it has introduced into employer/employee relations. The FMLA's coverage is sweeping. According to the Department of Labor, more than 76 million employees in the United States enjoy the protections of the FMLA. 71 Fed. Reg. 69504, 69511 (Dec. 1, 2006). In 2005, more than 10 million employees took leave for reasons covered by the FMLA. *Ibid.*[7]

Given the breadth of the FMLA's coverage, the comprehensiveness of the Fourth Circuit's ban on settlements and releases, the conflict in the circuits, and the conflict between the Fourth Circuit's and the Department of Labor's readings of the Department's own regulation, the court of appeals' decision has left many employers "caught in the middle, wondering which way to go." Jeffery J. Kros, *Courts Split on FMLA Waivers*, Workspan (Oct. 1, 2005). The instability and disuniformity in the law that has been created by the conflicting rulings and positions have significantly disrupted employer/employee relations and efforts to resolve employment disputes privately

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[7] The Department of Labor reported that 13 million workers took leave for reasons covered by the FMLA, but cautioned that its number "may be an upper-bound estimate." 71 Fed. Reg. at 69511.

without resort to court proceedings. The businesses engaged in commerce that are subject to the FMLA, see 29 U.S.C. 2611(4), often operate in multiple jurisdictions and use common severance agreements for their employees nationwide. Uncertainty regarding the legal viability of settlements or releases in severance packages will cause employers to limit or to eliminate offers of extra compensation to departing employees because the agreements will no longer provide end-of-employment closure against one of the most commonly implicated claims. That consequence harms the interests of employees as well as employers.

The division in the law creates particular problems for national companies because the opportunity for private resolution of disputes will now vary within the same company from employee to employee depending on the State in which the employee works or might choose to file suit. See 28 U.S.C. 1391(b)(1) & (c). The variety of venues in which FMLA claims can be filed – which includes the employer's state of incorporation and places of business, *ibid.* – creates a significant risk of forum shopping by employees whose previously resolved claims would be barred in other jurisdictions.

In addition, the question whether claims under a statute as broadly and commonly applicable as the FMLA can be waived or privately compromised has enormous practical, day-to-day implications for businesses and employees alike. Clarity in the law is critical – businesses cannot function in an environment in which the enforceability of settlements and severance agreements turns on and off as the business's operations and employees cross state lines. It

thus is unsurprising that the decision has generated substantial concern in the business community.[8]

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[8] See Earl M. Jones, III, Jason R. Dugas, and Jennifer A. Youpa, *Annual Survey of Texas Law: Employment Law*, 59 S.M.U. L. Rev. 1211, 1211 (Summer 2006) (Fourth Circuit's "startling" decision "takes away employers' security of knowing that a settlement is final and binding"); Whiteford, Taylor & Preston L.L.P., *Employers, Take Note: Your General Release May Not Be as Broad as You Think!*, Maryland Employment Law Letter (September 2005) (Fourth Circuit has "thrown a monkey wrench" into the common practice of providing enhanced severance benefits to departing employees in exchange for a general waiver and release of claims); Judy Greenwald, *Decision Limiting FMLA Waivers Creates Employer Headaches*, Business Insurance (Aug. 8, 2005) (Fourth Circuit creates a "land mine" for both employers and employees); *Can an Employer Secure the Release of an FMLA Claim in the 4th Circuit?*, Lab. & Emp. Update (Buchanan Ingersoll PC, Pittsburgh, Pa.), Nov. 2005, at 5; *The Family and Medical Leave Act Bars Waivers – Or Does It?*, Emp. L. Alert (Nixon Peabody LLP, New York, NY), Feb. 2004, at 2-3; *Fourth Circuit Rules that Employees Cannot Waive Their FMLA Rights Without Court or DOL Approval*, Alert (Greenberg Traurig, New York, N.Y.), July 2005, at 1-3; Ed Harold, *Woman Takes Money, Signs Release, Sues Anyway; Fourth Circuit Says "Okay,"* Lab. Letter (Fisher & Phillips LLP, Atlanta, Ga.), Sept. 2005, at 3; Melissa M. Kidd, *Fourth Circuit Holds that a General Release Is No Bar to FMLA Claims*, Workcite Emp. & Benefits Legal Update (Helms Mulliss Wicker, Charlotte, N.C.), Aug. 18, 2005, http://www.hmw.com/workcite/20050818.htm.; Joseph P. Harkins & Gary D. Shapiro, *Leave it Out? Family and Medical Leave Act Claims May No Longer Be Waived by a General Release*, ASAP (Littler Mendelson, P.C., S.F., Cal.), Aug. 2005, at 2; David K. Haase & John W. Drury, *Court Finds a Trap Hidden in Separation Agreements: The 4th Circuit Says Employees Cannot Waive Any FMLA Claims*, Nat'l L. J., Jan. 9, 2006; Peter A. Susser, *Court Says Waiving FMLA Rights Not Allowed*

The disruption caused by the court of appeals' decision does not stop there. The court has also adopted a rule that – without any anchor in statutory or regulatory text – requires the Department of Labor to establish a program for the review and approval "in a prompt and efficient manner" of potentially thousands of private releases and settlement agreements. App., *infra*, 16a; see also DOL C.A. Amicus Br. at 9. Unless this Court grants review, the Department of Labor will be required to devote scarce agency resources to both the creation of a new administrative process and the formulation of new legal standards for reviewing and approving FMLA waivers and settlements.

The Fourth Circuit also directed federal district courts to interpose themselves and begin "supervising settlements in court actions brought pursuant to the FMLA." *Id.* at 17a. Federal courts accordingly will have to develop procedures and case law to govern the processes and standards for judicial approval of FMLA settlements, and they must do so without the benefit of any statutory reference point. Moreover, the courts must find a way to perform their new supervisory task that comports with the federal courts' delimited role under Article III and its "case" or "controversy" requirement, see U.S. Const. Art. III, § 2.It is, of course, possible that the Department of Labor could amend its regulation. See 71 Fed. Reg. 69504, 69509-10 (Dec. 1, 2006) (broadly inviting public comment "on all issues related to [its] FMLA regu-

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Unless It Is Approved, Family and Medical Leave Handbook (Thompson, New York, N.Y.), Sept. 2007, at 1.

lations," and referencing 29 C.F.R. 825.220(d) as one of twelve potential issues). But at this juncture, any such amendment is hypothetical, because the Department has not stated its intention to propose an amendment to the regulation. Beyond that, even were such an amendment to be proposed, its adoption and implementation could be delayed for years by the rulemaking process and the resolution of any ensuing challenges under the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*

In the meantime, the courts and the Department would have to implement and develop processes and legal standards for review; employers and employees would continue to endure critical uncertainty in the law; employers who have already entered into private FMLA settlements or severance agreements would be denied the closure for which they and the employee contracted; and employers would remain subject to unwarranted and burdensome suits based upon faulty precedent. Even upon the adoption of such a regulation, moreover, substantial debate and litigation would ensue over its retroactive application, leaving in question the validity of existing releases in every jurisdiction other than the Fifth Circuit.

In *Ragsdale*, supra, this Court granted review to address the proper interpretation of a Department of Labor regulation under the FMLA in a case that, as here, presented a two-circuit split. See No. 00-6029 Pet. 11-12 *Ragsdale, supra*; No. 00-6029 U.S. Cert. Br. at 16-20, *Ragsdale, supra.* This case has even greater need for this Court's intervention, given not just the conflict with the Fifth Circuit and this Court's precedents governing both agency deference and the private resolution of disputes, but also the

far-reaching implications of the Fourth Circuit's decision for tens of thousands of employers and employees, for the public policy in favor of private settlement, and for the viability of thousands of already executed settlements and waivers.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

ON REHEARING
PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BARBARA TAYLOR,
Plaintiff-Appellant,
v.

PROGRESS ENERGY, INCORPORATED,
Defendant-Appellee.

NATIONAL EMPLOYMENT LAWYERS ASSOCIATION; NORTH CAROLINA ACADEMY OF TRIAL LAWYERS,
Amici Supporting Appellant,

EQUAL EMPLOYMENT ADVISORY COUNCIL; SOCIETY FOR HUMAN RESOURCE MANAGEMENT; CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; ELAINE CHAO, Secretary of Labor,
Amici Supporting Appellee.

No. 04-1525

Appeal from the United States District Court
for the Eastern District of North Carolina, at Wilmington.
Malcolm J. Howard, District Judge.
(CA-03-73-7-H)

Argued: October 25, 2006
Decided: July 3, 2007

Before MICHAEL and DUNCAN, Circuit Judges, and Robert E. PAYNE, United State District Judge for the Eastern District of Virginia, sitting by designation.

Opinion reinstated by published opinion. Judge Michael wrote the majority opinion, in which Judge Payne joined. Judge Duncan wrote a dissenting opinion.

COUNSEL

ARGUED: April Gordon Dawson, DAWSON, DAWSON & DAWSON, P.A., Graham, North Carolina, for Appellant. Zebulon Dyer Anderson, SMITH, ANDERSON, BLOUNT, DORSETT, MITCHELL & JERNIGAN, L.L.P., Raleigh, North Carolina, for Appellee. Howard Marc Radzely, UNITED STATES DEPARTMENT OF LABOR, Office of the Solicitor, Washington, D.C., for Elaine Chao, Secretary of Labor, Amicus Supporting Appellee. **ON BRIEF:** Robert M. Elliot, J. Griffin Morgan, ELLIOT, PISHKO, MORGAN, P.A., Winston-Salem, North Carolina, for National Employment Lawyers Association and North Carolina Academy of Trial Lawyers, Amici Supporting Appellant; Marissa M. Tirona, THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION (NELA), San Francisco, California, for National Employment Lawyers Association, Amicus Supporting Appellant. Stephen A. Bokat, Robin S. Conrad, Robert J. Costagliola, NATIONAL CHAMBER LITIGATION CENTER, INC., Washington, D.C., for The Chamber of Commerce of the United States of America; Ann Elizabeth Reesman, MCGUINESS, NORRIS & WILLIAMS, L.L.P., Washington, D.C., for Equal Employment Advisory Council and Society for Human Resource Management, Amici Supporting Appellee. Steven J. Mandel, Associate Solicitor, Paul L. Frieden, Counsel for Appellate Litigation, Lynn S. McIntosh, UNITED STATES DEPARTMENT OF LABOR, Office of the Solicitor, Washington, D.C., for Elaine Chao, Secretary of Labor, Amicus Supporting Appellee.

OPINION

MICHAEL, Circuit Judge:

The central issue in this appeal, now before us on rehearing, is the meaning of 29 C.F.R. § 825.220(d) (section 220(d)), a regulation implementing the Family and Medical Leave Act of 1993 (FMLA or Act), 29 U.S.C. § 2601 *et seq.* The regulation reads: "Employees cannot waive, nor may employers induce employees to waive, their rights under FMLA." In our vacated opinion we held that the regulation prohibits both the prospective and retrospective waiver of any FMLA right unless the waiver has the prior approval of the Department of Labor or a court. *Taylor v. Progress Energy, Inc.* (*Taylor I*), 415 F.3d 364, 369 (4th Cir. 2005), *vacated*, No. 04-1525, 2006 U.S. App. LEXIS 15744 (4th Cir. June 14, 2006). The losing party (the defendant) in *Taylor I* filed a petition for rehearing en banc, and the Secretary of Labor (the DOL) filed an amicus brief in support of that petition. The DOL disagreed with our interpretation of section 220(d), and we granted panel rehearing to consider the DOL's contrary interpretation. The case was reargued, this time with the agency participating. The DOL contends that section 220(d) bars only the prospective waiver of FMLA rights. After reconsideration we remain convinced that the plain language of section 220(d) precludes both the prospective and retrospective waiver of all FMLA rights, including the right of action (or claim) for a past violation of the Act. We therefore reinstate our opinion in *Taylor I.*

I.

An agency's interpretation of its own regulation is "controlling unless plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (internal quotation marks and citation omitted). As we will demonstrate, the DOL's interpretation of section 220(d) is inconsistent with the regulation.

A.

Again, the regulation states: "Employees cannot waive, nor may employers induce employees to waive, their rights under FMLA." 29 C.F.R. § 825.220(d). The DOL contends that in *Taylor I* we erred in interpreting section 220(d) by failing to focus on the word "rights." In its amicus brief to us the DOL argued that the word "rights" does not include claims. Later, the DOL substantially undercut this argument in an amicus brief filed in the Eastern District of Pennsylvania. In *Dougherty v. TEVA Pharms. USA, Inc.*, No. 05-2336, 2007 U.S. Dist. LEXIS 27200 (E.D. Pa. Apr. 11, 2007), the DOL conceded that the "right to sue," that is, the right to assert a *claim*, is a "right under the FMLA" that cannot be waived prospectively under the regulation. Brief of Secretary of Labor as Amicus Curiae at 4 n.6, *Dougherty*, 2007 U.S. Dist. LEXIS 27200 (*Dougherty* Amicus Br.). We will consider the DOL's shifting arguments momentarily, but first we will explain why the section 220(d) phrase "rights under FMLA" plainly includes *claims* under the FMLA. The explanation is simple.

There are three categories of "rights under FMLA," substantive, proscriptive, and remedial. Substantive

rights include an employee's right to take a certain amount of unpaid medical leave each year and the right to reinstatement following such leave. 29 U.S.C. §§ 2612(a)(1)(D), 2614(a)(1). Proscriptive rights include an employee's right not to be discriminated or retaliated against for exercising substantive FMLA rights. *Id.* § 2615(a)(2). The remedial right is an employee's "[r]ight of action," or "right . . . to bring an action" or claim, "to recover [ ] damages or [obtain] equitable relief" from an employer that violates the Act. *Id.* §§ 2617(a)(2), (a)(4). The regulation, by specifying "rights under FMLA," therefore refers to *all rights* under the FMLA, including the right to bring an action or claim for a violation of the Act.

This reading is confirmed by the regulation's relationship to § 2615(a)(1) of the statute. Section 2615(a)(1) makes it "unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, *any right* provided under [the FMLA]." (emphasis added). The regulation implements (among others) this statutory provision, making clear that an employer cannot "induce employees to waive[ ] their rights under FMLA" because that would interfere with an employee's exercise of, or attempt to exercise, FMLA rights. *See* 29 C.F.R. § 825.220(d). Because § 2615(a)(1) prohibits employer interference with "any right provided under [the FMLA]," including § 2617(a)(2)'s right of action, the regulation's phrase, "rights under FMLA," also refers to the statutory right of action or claim.

Section 220(d)'s use of the word "rights" to refer to a right of action or claim is consistent with common usage. *See Brooklyn Sav. Bank v. O'Neil*, 324 U.S.

697, 705 (1945) (stating that an employee's Fair Labor Standards Act (FLSA) claim for liquidated damages is a "statutory right" that cannot not be waived in a settlement agreement); Black's Law Dictionary 1348 (8th ed. 2004) (defining "legal right" as "[t]he capacity of asserting a legally recognized claim against one with a correlative duty to act").

For all of these reasons, section 220(d)'s prohibition on the waiver of rights includes a prohibition on the waiver of claims.

We now turn to the specifics of the DOL's evolving argument. In its amicus brief to us the agency points out that "the regulation refers only to the waiver of FMLA '*rights*' and makes no mention of the settlement or release of *claims*." DOL Amicus Br. at 4. Thus, the DOL starts out with the assertion that section 220(d) "regulates only the prospective waiver of FMLA *rights*, not the retrospective settlement of FMLA *claims*." *Id.* But the DOL then seeks to narrow the scope of the regulation even further by adopting the holding of *Faris v. Williams WPC-I, Inc.*, 332 F.3d 316 (5th Cir. 2003). *See* DOL Amicus Br. at 6 (noting "Department's and [*Faris*'s] plain reading" of section 220(d)); *id.* at 4-5 (endorsing district court's "correct[ ] conclu[sion]," which is identical to *Faris*'s, as to the meaning of section 220(d)). *Faris* held that the regulation prohibits only the prospective waiver of the FMLA's *substantive* rights. 332 F.3d at 322.

In endorsing the *Faris* holding, the DOL advanced an interpretation of the regulation that would allow an employee to waive prospectively her proscriptive and remedial rights under the FMLA. Thus, on her

first day on the job an employee could prospectively waive (1) her proscriptive right to be free from employer retaliation for her attempts to exercise FMLA rights and (2) her right to sue for an employer's refusal to grant FMLA leave. This interpretation would undermine the purpose of the FMLA and section 220(d) and turn the FMLA's substantive rights into empty and unenforceable pronouncements.

The DOL acknowledged this problem in its later-filed amicus brief in *Dougherty*, where it rejected *Faris*'s determination that the regulation applies only to substantive rights. *Dougherty* Amicus Br. at 4 n.6. There, the DOL recognized that the "right to sue" (or assert a claim) is also a "right under the FMLA" that cannot be waived prospectively.[1] *Id.* The DOL thus abandoned its previous position that section 220(d) does not prohibit the waiver of any claim. According to the DOL's most recent interpretation, an employee cannot prospectively waive claims for future violations of the FMLA, but she can waive claims for past violations. The relevant distinction for the DOL is therefore between prospective and retrospective waivers, not between rights and claims as it argued in its amicus brief before this court.

There is nothing in the text of section 220(d) that permits a distinction between prospective and retrospective waivers. The regulation states plainly

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[1] The DOL characterizes the right to sue as a proscriptive right. See Dougherty Amicus Br. at 4 n.6. The right to sue for violations of the FMLA, see 29 U.S.C. § 2617(a)(2), is better characterized as a remedial right. Nevertheless, we agree that the right to sue is a "right under the FMLA."

that "[e]mployees cannot waive . . . their rights under FMLA." 29 C.F.R. § 825.220(d). As we pointed out in *Taylor I*, the word "waive" has both a prospective and retrospective connotation. 415 F.3d at 370. Courts, including the Supreme Court, frequently use the word "waive" to refer to the post-dispute or retrospective release or settlement of claims. *See, e.g.*, *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 426-27 (1998) ("An employee may not waive an ADEA claim unless the waiver or release satisfies [statutory] requirements.") (internal quotations omitted); *Brooklyn Sav. Bank*, 324 U.S. at 710 (stating that employee could not "waive claim[ ] for liquidated damages" against employer for past violations of the FLSA); *Jefferson v. Vickers, Inc.*, 102 F.3d 960, 964 (8th Cir. 1996) (stating that an employer can condition certain retirement benefits on an employee's "waiver of employment claims"); *Allen v. Sybase, Inc.*, 468 F.3d 642, 646 (10th Cir. 2006) (noting that employees signed a release form "in which they waived any claims they had against the company"). Because the word "waive" has a retrospective connotation, the regulation applies to the retrospective waiver of claims.

B.

The DOL urges us to consider the recent *Dougherty* decision in the Eastern District of Pennsylvania. 2007 U.S. Dist. LEXIS 27200. There, the court, on reasoning developed on its own, reached the result sought by the DOL. The court held that section 220(d) does not prohibit the retrospective waiver or settlement of a claim because "the decision to bring a claim" is not a right under the FMLA. *Id.* at *23. The

reasoning behind this holding does not withstand close analysis.

The court first stated that section 220(d) prohibits waivers of the FMLA's "substantive protections (i.e. FMLA leave) and its proscriptive ones (i.e. right to sue for retaliation)."[2] *Id.* at *24. It concluded, however, that retrospective waivers are permissible because the "decision to bring a claim (saying that you are going to *exercise* your right to sue) is not a separate right under the FMLA." *Id.* (emphasis in original). It added, "Nowhere does the FMLA (or the regulation) mandate that an aggrieved employee must exercise her proscriptive rights and bring an FMLA claim." *Id.*

To begin with, *Dougherty*'s conclusion — that "the ability [or decision] to bring [an FMLA] claim" is "a kind of right" but not a "right under the FMLA" — ignores FMLA's text. The FMLA explicitly makes the "right . . . to bring an action" or claim for a violation a right under the Act. *See* 29 U.S.C. §§ 2617(a)(2), (a)(4).

Moreover, *Dougherty* confuses the decision to exercise rights with waiver of rights. The regulation does not prevent an employee from deciding not to exercise her FMLA rights. An employee denied FMLA leave could, for example, decide initially not to bring a claim for the violation. This employee does not waive any rights because she could reconsider and decide to bring a claim at a later time. However, an employee who signs a release or settlement

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[2] The Dougherty court, like the DOL, categorizes the right to sue as a proscriptive right. 2007 U.S. Dist. LEXIS 27200, at *21.

agreement does more than *decide* not to exercise her right to sue; she relinquishes that right entirely. While section 220(d) does not prevent an employee from deciding not to exercise the right to sue, it does prevent her from waiving or relinquishing that right.

We are not persuaded by the reasoning in *Dougherty*.

C.

The DOL contends that its reading of section 220(d) "is consistent with the well-accepted policy disfavoring prospective waivers [of rights], but encouraging settlement of claims, in employment law." DOL Amicus Br. at 5. This statement overlooks an important exception in employment law to the general policy favoring the post-dispute settlement of claims. The settlement or waiver of claims is not permitted when "it would thwart the legislative policy which [the employment law] was designed to effectuate." *Brooklyn Sav. Bank*, 324 U.S. at 704.

For example, under the FLSA, a labor standards law, there is a judicial prohibition against the unsupervised waiver or settlement of claims. *See D.A. Schulte, Inc. v. Gangi*, 328 U.S. 108, 114-16 (1946). In the FLSA, Congress, among other things, prescribes a minimum wage to foster the "minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. § 202(a). Any wage settlement that gave the employee less than the statutory minimum would frustrate Congress's objective of imposing uniform minimum pay requirements. *See Barrentine v. Arkansas-Best*

Freight Sys., Inc., 450 U.S. 728, 740 (1981) (stating that waivers of FLSA rights and claims would nullify the congressional purpose of imposing nationwide minimum standards of employment). Moreover, allowing below-minimum pay through settlement discounts would permit an employer to evade the FLSA and gain an unfair competitive advantage. *See Brooklyn Sav. Bank*, 324 U.S. at 710.

The reasons for the prohibition on private settlement of FLSA claims apply with equal force to FMLA claims. Congress explains in the FMLA's legislative history that the Act "fits squarely within the tradition of the labor standards laws that . . . preceded it," such as the FLSA and the Occupational Safety and Health Act. S. Rep. No. 1033, at 5 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 7. The FMLA, following the FLSA model, provides a "minimum floor of protection" for employees by guaranteeing that a minimum amount of family and medical leave will be available annually to each covered employee. *Id.* at 18. As with the FLSA, private settlements of FMLA claims undermine Congress's objective of imposing uniform minimum standards. Because the FMLA requirements increase the cost of labor, employers would have an incentive to deny FMLA benefits if they could settle violation claims for less than the cost of complying with the statute. Further, employers settling claims at a discount would gain a competitive advantage over employers complying with the FMLA's minimum standards. *See Taylor I*, 415 F.3d at 375. To avoid these problems, section 220(d) follows the FLSA model and prohibits the waiver of all FMLA rights. All employers are held to providing the minimum leave specified, without the

option to deny it and buy out claims at a later date.

The DOL fails in its attempt to analogize the FMLA to Title VII and the Age Discrimination in Employment Act (ADEA), under which the retrospective waiver of claims is allowed. To begin with, neither Title VII nor the ADEA has an implementing regulation, like section 220(d), that prohibits the waiver of all rights under the statute.[3] Furthermore, Title VII and the ADEA are not labor standards laws like the FMLA. Rather, Title VII and the ADEA were enacted to outlaw discrimination against specific classes of employees and provide redress for injuries caused by discrimination. *See Landgraf v. Usi Film Prods.*, 511 U.S. 244, 254 (1994). Private settlements further these purposes by imposing a cost on discrimination that encourages compliance. The same cannot be said with respect to the FMLA, where settlements that are cheaper than compliance would encourage noncompliance, thereby undermining the Act's purpose of imposing minimum standards for family and medical leave. In short, Title VII and the ADEA do not provide the best settlement model for the FMLA. Congress has indicated as much by analogizing the FMLA to the FLSA, under which the private settlement of claims is prohibited. 29 U.S.C. §§ 2616, 2617(b); *see also* S. Rep. 103-3, at 35 (1993), *reprinted in* 1993

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[3] Such a regulation would not be possible under either Title VII or the ADEA. The Equal Employment Opportunity Commission, the agency charged with the administration and enforcement of Title VII, lacks authority to issue binding substantive regulations with respect to that statute. *See General Elec. Co. v. Gilbert*, 429 U.S. 125, 141 (1976); 42 U.S.C. § 2000e-12(a). The ADEA, for its part, specifically authorizes the "knowing and voluntary" retrospective waiver of claims. *See* 29 U.S.C. § 626(f)(1).

U.S.C.C.A.N. 3, 37 (stating that the FMLA's "enforcement scheme is modeled on the enforcement scheme of the FLSA"). Indeed, as we discuss in part II, the DOL itself likened the FMLA to the FLSA when it promulgated section 220(d) and prohibited employee waiver of all FMLA rights.

II.

The DOL's present interpretation of section 220(d) is also inconsistent with what the DOL said it intended the regulation to mean at the time it was promulgated. We do not defer to an agency's interpretation if "an alternative reading is compelled by . . . indications of the Secretary's intent at the time of the regulation's promulgation." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (citation omitted). As we pointed out in *Taylor I*, when the regulation was being finalized, the DOL specifically considered and rejected proposed amendments that would have permitted the interpretation now advanced by the DOL. *See* 415 F.3d at 370-71. In the "Summary of Major Comments" published in the 1995 preamble to the final version of section 220(d) and other FMLA implementing regulations, the DOL acknowledged the concerns expressed by the U.S. Chamber of Commerce and several corporations regarding "the 'no waiver of rights' provisions" in section 220(d). Preamble to the Final Regulations Implementing the Family and Medical Leave Act of 1993, 60 Fed. Reg. 2180, 2218 (Jan. 6, 1995). These representatives of business "recommended explicit allowance of waivers and releases in connection with [the] settlement of FMLA claims and as part of a severance package (as allowed under Title VII and

ADEA claims, for example)." *Id.* In response the DOL explained that it had "given careful consideration to the comments on this section [section 220(d)] . . . and . . . concluded that prohibitions against employees waiving their rights and employers inducing employees to waive their rights constitute sound public policy under the FMLA, as is also the case under other labor standards statutes such as the FLSA." *Id.* By rejecting business's suggestion that the regulation be modified to permit waivers and releases in connection with the *settlement* of FMLA claims, the DOL made clear that it intended for section 220(d) to prohibit the retrospective waiver of claims.

The DOL now says that it actually made no response to the claims settlement comment from the business representatives. According to the DOL, our decision in *Taylor I* "incorrectly interpreted the Department's silence as to the retrospective settlement of FMLA claims in the preamble to the final regulations as an indication that such settlements are prohibited under section 220(d)." DOL Amicus Br. at 9. The DOL asks us to take what it calls silence "as an indication that it did not perceive [retrospective] settlements as falling within the scope of the regulation." *Id.* The DOL was not silent. It did respond and its response must take into account the comment. The comment could not have been clearer: business representatives asked for an amendment to the proposed regulation that would explicitly allow "waivers and releases in connection with *settlement* of FMLA claims," that is, claims for past violations. 60 Fed. Reg. at 2218. The DOL's response was likewise clear. The agency said it had

carefully considered the comment, indicating that it fully understood what the comment proposed. *Id.* The DOL then rejected the proposal with its conclusion "that prohibitions against employees waiving their rights and employers inducing employees to waive their rights constitute sound public policy under the FMLA, as is also the case under other labor standards statutes such as the FLSA." *Id.* The clarity and firmness of the DOL's rejection of the comment is underscored by the agency's statement that it was adopting the same no-waiver-of-rights policy that applies to the FLSA. Under the FLSA, of course, the unsupervised settlement of claims is not allowed.

The DOL also argues that its statement in the preamble that "an employee on FMLA leave may be required to give up his or her remaining FMLA leave entitlement to take an early-out offer from the employer," 60 Fed. Reg. at 2219, made clear that section 220(d) would not affect releases in connection with severance packages. We disagree. This statement only addressed the ERISA Industry Committee's concern that an employee who takes early retirement while on FMLA leave might continue to assert leave rights, such as the right to continuing group health coverage. The DOL's response simply clarifies that the employee does not waive any FMLA rights in this circumstance because the employee's right to FMLA leave ends with the cessation of the employment relationship. *See Brohm v. JH Props., Inc.*, 149 F.3d 517, 523 (6th Cir. 1998) (holding that employee who received medical treatment a week after he was fired was not eligible for FMLA leave). The response does not imply that an employee who accepts an early retirement may

waive her right of action for past FMLA violations, for that right would extend beyond the end of employment.

For these reasons we adhere to our *Taylor I* assessment of the DOL's intent at the time of section 220(d)'s promulgation: "By rejecting business's suggestion that waivers and releases should be allowed in connection with the post-dispute settlement of FMLA claims, the DOL made clear that § 825.220(d) was never intended to have only prospective application." 415 F.3d at 371. As a result, we do not defer to the completely different interpretation of the regulation that the DOL advances in this case. *See Thomas Jefferson Univ.*, 512 U.S. at 512.

III.

In *Taylor I* we relied on the congressionally recognized similarities between the FMLA and the FLSA to conclude that section 220(d) "must be construed to allow the waiver or release of FMLA claims with prior DOL or court approval," as is the case with respect to FLSA claims. 415 F.3d at 374. The DOL asserts that "the requirement of Department or court supervision" will create added burdens on the DOL and the courts and "will harm employees by delaying resolution of their cases." DOL Amicus Br. at 15. We are confident that both the DOL and the courts will work diligently to deal with these cases in a prompt and efficient manner. The DOL already has a system in place for reviewing FMLA claim settlements in administrative cases, and it has had even broader experience in supervising

FLSA settlements. The courts will only be supervising settlements in court actions brought pursuant to the FMLA, and we do not believe that this responsibility will create an undue burden.[4]

IV.

We reaffirm our conclusion that, without prior DOL or court approval, 29 C.F.R. § 825.220(d) bars the prospective and retrospective waiver or release of rights under the FMLA, including the right to bring an action or claim for a violation of the Act. We therefore reinstate our prior opinion in *Taylor v. Progress Energy, Inc.*, 415 F.3d 364 (4th Cir. 2005).

IT IS SO ORDERED.

DUNCAN, Circuit Judge, dissenting:

The Family and Medical Leave Act (the "FMLA") provides aggrieved employees with a "[r]ight of action," 29 U.S.C. § 2617(a)(2), or a "right . . . to bring an action," *id.* § 2617(a)(4), against an employer who commits any of the acts prohibited by the statute. The Department of Labor (the "DOL"), in its regulations implementing the FMLA, has declared:

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[4] We note that the DOL appears to have section 220(d) under consideration in connection with its rulemaking responsibilities under the FMLA. Shortly after oral argument the DOL issued a notice that includes a request for public comment on section 220(d). Request for Information on the Family and Medical Leave Act of 1993, 71 Fed. Reg. 69504, 69509-10 (Dec. 1, 2006). The notice sets forth our interpretation of the regulation in *Taylor I* and notes that the agency argued for a different interpretation in its post-decision amicus brief. The notice's information request — couched in language that telegraphs the DOL's current interpretation – "seeks input on whether a limitation should be placed on the ability of employees to settle their past FMLA claims." *Id.*

"Employees cannot waive, nor may employers induce employees to waive, their rights under FMLA." 29 C.F.R. § 825.220(d). The crux of the majority's reasoning is that "[t]he regulation, by specifying 'rights under FMLA,' . . . refers to *all rights* under the FMLA," Majority Op. at 4, including in particular the "*[r]ight* of action" or "*right* . . . to bring an action" described in § 2617(a)(2), (4) (emphasis added).

The majority's position is, standing alone, eminently reasonable. Indeed, we defensibly so held after first hearing oral argument in this appeal. *See Taylor v. Progress Energy, Inc.* (*Taylor I*), 415 F.3d 364, 369 (4th Cir. 2005), *vacated*, No. 04-1525, 2006 U.S. App. LEXIS 15744 (4th Cir. June 14, 2006). We reached our decision guided by established rules of statutory construction appropriate for the procedural posture of the case as it then existed. *See id.* The majority clearly and thoughtfully recounts that analysis here.

The course of this appeal was unexpectedly diverted, however, when the DOL rejected the analysis of *Taylor I* in its belated amicus brief supporting Progress Energy's petition for rehearing en banc. *See* Amicus Br. for Secretary of Labor at 4 (interpreting the regulation not to prohibit the waiver of causes of action). After such interposition, the question in the case was necessarily recast. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997) (recharacterizing the central issue in the case, after the Secretary of Labor filed an amicus brief, as whether the Secretary's interpretation of his own regulations is "plainly erroneous or inconsistent with the regulation" (internal quotations omitted)).

Therefore, the issue before us is no longer whether the interpretation that we adopted in *Taylor I* was reasonable, but rather whether it is compelled by the language of the regulation.

I feel constrained to conclude that it is not. There are few words in the legal lexicon more ubiquitous and freighted than the term "right." *See United States v. Patrick*, 54 F. 338, 348 (C.C.M.D. Tenn. 1893) ("The words 'rights' or 'privilege' have, of course, a variety of meanings, according to the connection or context in which they are used."); Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale L.J. 16, 30-31 (1913) ("[T]he term 'rights' tends to be used indiscriminately to cover what in a given case may be a privilege, a power, or an immunity, rather than a right in the strictest sense; and this looseness of language is occasionally recognized by the authorities. . . . [W]e must . . . recogniz[e] . . . the very broad and indiscriminate use of the term 'right.'" (internal punctuation altered)). The mere fact that the statute creates a "[r]ight of action," 29 U.S.C. § 2617(a)(2), and the regulation refers to "rights under FMLA," 29 C.F.R. 825.220(d), may suggest, but does not compel, an interpretation that the two uses of the word are coextensive. In light of the elasticity of the term "right," it is not clear to me that "rights under FMLA" on its face subsumes accrued causes of action.

Given the existence of at least some measure of ambiguity in the regulation's use of the term "rights," then, I cannot but conclude that deference to the DOL's interpretation is appropriate under *Auer*, 519 U.S. at 461. *See Christensen v. Harris County*, 529

U.S. 576, 588 (2000) ("*Auer* deference is warranted . . . when the language of the regulation is ambiguous."); *Humanoids Group v. Rogan*, 375 F.3d 301, 306 (4th Cir. 2004). I am further unpersuaded by any suggestion that the inconsistencies in the DOL's interpretation of the regulation over time must lessen the level of deference to be accorded its present view. *See Long Island Care at Home, Ltd. v. Coke*, 127 S. Ct. ___, ___, slip op. at 10-11 (2007) ("[A]s long as interpretive changes create no unfair surprise—and the Department's recourse to notice-and-comment rulemaking in an attempt to codify its new interpretation makes any such surprise unlikely here—the change in interpretation alone presents no separate ground for disregarding the Department's present interpretation." (internal citations omitted)); *cf.* Majority Op. at 12 n.4 (noting that the DOL has issued notice that it is considering modifying the regulation to codify unambiguously its present interpretation).

Nevertheless, I fully agree that the history of the regulation at issue provides a model of how *not* to proceed during the rulemaking process. *See* Majority Op. at 9-12. Furthermore, timely intervention by the DOL before we issued *Taylor I* would have obviated the necessity of an additional hearing in this appeal, with its attendant expenditure of judicial and party resources.

With these cautionary addenda, I respectfully dissent.

APPENDIX B

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

BARBARA TAYLOR,
Plaintiff-Appellant,
v.
PROGRESS ENERGY, INCORPORATED,
Defendant-Appellee.

No. 04-1525

Appeal from the United States District Court
for the Eastern District of North Carolina, at Wilmington.
Malcolm J. Howard, District Judge.
(CA-03-73-7-H)

Argued: February 1, 2005
Decided: July 20, 2005

Before MICHAEL and DUNCAN, Circuit Judges, and Robert E. PAYNE, United State District Judge for the Eastern District of Virginia, sitting by designation.

Reversed in part, vacated in part, and remanded by published opinion. Judge Michael wrote the opinion, in which Judge Duncan and Judge Payne joined.

COUNSEL

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ANDERSON, BLOUNT, DORSETT, MITCHELL & JERNIGAN, Raleigh, North Carolina, for Appellee.

OPINION

MICHAEL, Circuit Judge:

Barbara Taylor sued Progress Energy, Inc. (Progress), the parent company of her former employer, Carolina Power & Light Company (CP&L), alleging violations of her rights under the Family and Medical Leave Act of 1993 (FMLA or Act), 29 U.S.C. § 2601 *et seq.*, including the violation of (1) her substantive right to twelve weeks of unpaid leave to deal with a serious health condition and (2) her proscriptive right not to be discriminated or retaliated against for exercising her substantive FMLA rights. Progress argued in its motion for summary judgment that a release Taylor signed constituted a valid waiver of her FMLA claims. The district court granted Progress's motion, thereby rejecting Taylor's argument that 29 C.F.R. § 825.220(d), a Department of Labor (DOL) regulation, bars the waiver or release of FMLA rights. We conclude that § 825.220(d) prohibits the release as it relates to Taylor's FMLA claims and that the regulation is valid under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). We therefore reverse the district court's summary judgment order and remand for further proceedings.

I.

Because the district court granted Progress's motion for summary judgment, we state the facts in

the light most favorable to Taylor, the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). In 1993 Taylor started working for CP&L, a subsidiary of Progress, in the Document Services Unit at the Brunswick Nuclear Plant in North Carolina. She was originally hired as a technical aide and later became a data management assistant. In April 2000 she began experiencing extreme pain and swelling in her right leg. Taylor consulted her doctor, who ordered a week of bed rest that caused her to miss five days of work in late April or early May. The doctor informed Taylor that she would need to undergo a series of medical tests, including heart tests, in an effort to determine the cause of her symptoms. Thereafter, during the months of June and July, Taylor missed a number of days of work due to medical testing and treatment. Immediately after her first health-related absence in April or May, and again when she had to miss work for medical tests in June and July, Taylor asked a representative of CP&L's human resources department about the possibility of leave under the FMLA. The representative told Taylor that she was not eligible for FMLA leave because she had not been absent from work for more than five consecutive days at any one time.

In August 2000 Taylor underwent a spinal tap in a further effort to determine the cause of her health problems. Complications from this procedure caused her to miss a full week (five days) of work and additional days in the following weeks. In October Taylor received a written warning from her supervisor and the human resources representative stating that she "had exceeded the company's average

sick time." J.A. 53. When Taylor sought guidance on how best to handle her health-related absences, she was told simply that she needed to improve her attendance. In November Taylor underwent more testing that kept her out of work for another five days. This testing revealed that an abdominal mass was the cause of the pain and swelling in Young's leg, and her doctor recommended immediate surgery to remove the mass. Taylor informed the human resources representative of the most recent test results and again asked whether any of her missed time from work qualified as FMLA leave. Again, the departmental representative answered that the missed time did not qualify because Taylor had not been out of work for more than five consecutive days. Taylor had surgery to remove the abdominal mass in December 2000. She was out of work for approximately six weeks and was told that this period qualified as FMLA leave. Taylor later discovered that she had been credited with FMLA leave for only four of these six weeks.

In February 2001 Taylor received her performance evaluation for the prior year. She was given a poor productivity rating because of her health-related absences, and she received only a one-percent pay raise while the average raise given by CP&L was approximately six percent. Soon thereafter (in March), Taylor learned that CP&L planned to lay off some of its employees in a reduction in force and that the company intended to select employees for dismissal based, at least in part, on past performance. Taylor contacted the DOL about CP&L's refusal to grant her FMLA leave and was told that her prior medical leave qualified under the

FMLA and that FMLA absences could not be counted against her for any reason.

In an effort to save her job, Taylor asked CP&L on several occasions to correct her 2000 performance evaluation to reflect that her various absences qualified as FMLA leave. A human resources representative denied Taylor's requests, and the company informed her about two weeks later (on May 17, 2001) that her employment was being terminated. Taylor was told that she was eligible for benefits under CP&L's transition plan, which included seven weeks of paid administrative leave. She was also told that she would receive additional benefits (including monetary compensation) if she signed and returned a general release and severance agreement (the release) within forty-five days. Taylor signed and returned the release to CP&L on June 4. The relevant section reads as follows:

> *GENERAL RELEASE OF CLAIMS.* IN CONSIDERATION OF SEVERANCE PAYMENTS MADE BY THE COMPANY, EMPLOYEE HEREBY RELEASES CP&L [AND] ITS PARENT . . . FROM *ALL* CLAIMS AND WAIVES *ALL* RIGHTS EMPLOYEE MAY HAVE OR CLAIM TO HAVE RELATING TO EMPLOYEE'S EMPLOYMENT WITH CP&L . . . OR EMPLOYEE'S SEPARATION THEREFROM, arising from events which have occurred up to the date Employee executes this General Release, including *but not limited to*, claims . . . for relief, including *but not limited to*, front pay, back pay, compensatory damages,

> punitive damages, injunctive relief, attorneys' fees and costs or any other remedy, arising under: (i) the Age Discrimination In Employment Act of 1967, as amended, ("ADEA"); (ii) the Employee Retirement Income Security Act of 1974, as amended, ("ERISA"); (iii) Title VII of the Civil Rights Act of 1964, as amended; (iv) the Energy Reorganization Act and Atomic Energy Act, both as amended; (v) the Americans With Disabilities Act ("ADA"); (vi) any wrongful termination claim under any state or federal law; (vii) claims for benefits under any employee benefit plan maintained by CP&L related to service credits or other issues; (viii) claims under the Older Workers Benefit Protection Act of 1990 ("OWBPA"); and (ix) any other federal, state or local law.

J.A. 18. Thus, while the release does not mention FMLA claims by name, it does include a catchall category for "other federal . . . law" claims besides those specifically listed. *Id.* On July 20, 2001, CP&L sent Taylor a check for approximately $12,000 pursuant to the terms of the release and related documents. (Taylor did not return the money when she later filed this action against Progress.)

After her separation from CP&L, Taylor again contacted the DOL concerning the company's failure to designate her health-related absences as FMLA leave, the resulting negative performance evaluation, and the company's use of the negative evaluation in its decision to terminate her employment. Taylor was

told that she could try to resolve her concerns directly with CP&L, so she contacted the director of the company's human resources department in January 2002. The director corrected Taylor's performance evaluation but failed to adjust her February 2001 salary increase to reflect the improved evaluation and failed to address any of the other issues Taylor had raised.

Thereafter, on May 9, 2003, Taylor sued Progress in federal court under 29 U.S.C. § 2617, alleging that the company had violated the FMLA by (1) not fully informing her of her FMLA rights, (2) improperly denying her requests for medical leave, (3) terminating her employment because of her medical absences, and (4) terminating her employment because she complained about the company's violations of the FMLA. The complaint sought an injunction directing Progress to rehire Taylor, compensatory damages, liquidated damages, and attorneys' fees and costs. Progress filed a motion for summary judgment, arguing that the release was valid and provided the company a complete defense to Taylor's suit. In response Taylor contended that 29 C.F.R. § 825.220(d) — which provides that "[e]mployees cannot waive, nor may employers induce employees to waive, their rights under [the] FMLA" — barred enforcement of the release insofar as her FMLA rights are concerned. At the same time, Taylor moved to amend her complaint to substitute CP&L as a defendant and to add an allegation that CP&L's actions had been willful. The district court granted Progress's motion for summary judgment, holding that § 825.220(d) does not render the release unenforceable. The district court denied as futile

Taylor's motion to amend her complaint, concluding that the release would also bar suit pursuant to the proposed amendment. This appeal followed.

II.

A.

Taylor argues that the district court erred in granting summary judgment to Progress because 29 C.F.R. § 825.220(d) prevents the company from enforcing the release insofar as Taylor's FMLA rights are concerned. The district court, relying on *Faris v. Williams WPCI, Inc.*, 332 F.3d 316 (5th Cir. 2003), held that § 825.220(d) prohibits only the prospective waiver of substantive FMLA rights. Thus, according to the district court, the regulation does not apply to (1) the retrospective waiver or release of FMLA claims or (2) the waiver or release of claims that an employer has discriminated or retaliated against an employee for the exercise of her substantive FMLA rights. The district court's interpretation of the regulation is a legal conclusion that we review de novo. *See United States v. Lofton*, 233 F.3d 313, 317 n.4 (4th Cir. 2000).

We disagree with the district court's interpretation of § 825.220(d). The regulation's plain language prohibits both the retrospective and prospective waiver or release of an employee's FMLA rights. In addition, the regulation applies to all FMLA rights, both substantive and proscriptive (the latter preventing discrimination and retaliation). Finally, the DOL, by recognizing that the FMLA's enforcement scheme is analogous to that of the Fair

Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.*, has indicated that § 825.220(d) permits the waiver or settlement of FMLA claims only with the prior approval of the DOL or a court. For reasons we discuss more fully below, we conclude that the regulation is based on a permissible construction of the FMLA, and it is not "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844. As a result, we agree with Taylor that § 825.220(d) renders the release unenforceable with respect to her FMLA rights.

B.

As noted above, the FMLA creates both substantive and proscriptive rights. *See Chaffin v. John H. Carter Co.*, 179 F.3d 316, 319 (5th Cir. 1999); *Hodgens v. Gen. Dynamics Corp.*, 144 F.3d 151, 159-60 & nn.2-4 (1st Cir. 1998); *Diaz v. Fort Wayne Foundry Corp.*, 131 F.3d 711, 712-13 (7th Cir. 1997). The substantive rights include an employee's right to take up to twelve weeks of unpaid leave in any one-year period because of a serious health condition, 29 U.S.C. § 2612(a)(1)(D); the right to take such leave on an intermittent basis, or on a reduced work schedule, when medically necessary, *id.* § 2612(b)(1); and the right to reinstatement following such leave, *id.* § 2614(a)(1). The proscriptive rights include an employee's right not to be discriminated or retaliated against for exercising substantive FMLA rights or for otherwise opposing any practice made unlawful by the Act. *Id.* §§ 2614(a)(2), 2615(a). Taylor's complaint alleges the violation of both types of FMLA rights.

C.

1.

Again, 29 C.F.R. § 825.220(d) states that "[e]mployees cannot waive, nor may employers induce employees to waive, their rights under [the] FMLA." This appeal turns on the proper interpretation of the regulation, and our analysis is controlled by *Chevron*. We therefore begin with *Chevron*'s first step and ask "whether Congress has directly spoken to the precise question" of whether an employee can waive (or whether an employer can induce an employee to waive) her rights under the FMLA. 467 U.S. at 842. "[I]f the statute is silent or ambiguous with respect to [this] specific issue," *id.* at 843, then Congress "has by implication delegated authority to the agency charged with administering the statute" to promulgate regulations to deal with the issue, *United States v. Deaton*, 332 F.3d 698, 708 (4th Cir. 2003). The FMLA neither explicitly provides for nor precludes the waiver or settlement of claims. *See* 29 U.S.C. § 2601 *et seq.* Congress therefore has not spoken directly to this particular issue, but it has charged the Secretary of Labor with the job of administering the FMLA, *see, e.g.*, *id.* §§ 2616, 2617(b), and "prescrib[ing] such regulations as are necessary to carry out" the Act, *id.* § 2654. In accordance with this statutory delegation of rulemaking authority, the Secretary promulgated comprehensive regulations, including 29 C.F.R. § 825.220(d), to implement the FMLA. *See* 29 C.F.R. § 825.100 *et seq.* We thus conclude for purposes of *Chevron*'s step one that Congress has not spoken directly on the issue of whether FMLA rights can be waived and that the Act grants the Secretary (or the DOL) authority to address this issue.

2.

a.

Before proceeding to *Chevron*'s step two, we must resolve the dispute over what § 825.220(d) actually means. *See Deaton*, 332 F.3d at 709. After that, we will be in a position to decide at step two whether the regulation is based on a permissible construction of the statute. *See Chevron*, 467 U.S. at 843. As for § 825.220(d)'s meaning, we conclude that the regulation prohibits both the prospective and retrospective waiver of any FMLA right (whether substantive or proscriptive) unless the waiver has the prior approval of the DOL or a court. This means that § 825.220(d) renders the release unenforceable with respect to Taylor's FMLA claims.

In reaching this conclusion, we first examine § 825.220(d)'s plain language, *see Deaton*, 332 F.3d at 709, which unambiguously prohibits the waiver or release of FMLA claims. The regulation states that "[e]mployees cannot waive, nor may employers induce employees to waive, their rights under [the] FMLA." 29 C.F.R. § 825.220(d). Section 825.220(d) thus regulates the employment relationship by prohibiting any employer-employee agreement that would adjust or eliminate FMLA rights. Moreover, the regulation does not limit itself to precluding only the prospective waiver of FMLA rights. The key word is "waive," and we have found no definition of the word that suggests it has only a prospective connotation. Black's defines "waive" as "[t]o abandon, renounce, or surrender (a claim, privilege, right, etc.); to give up (a right or claim) voluntarily." Black's Law Dictionary 1611 (8th

ed. 2004). Webster's defines "waive" as "to give up . . .: FORSAKE . . . to withdraw . . . to relinquish voluntarily (as a legal right) . . . to refrain from pressing or enforcing (as a claim or rule) . . . RELINQUISH." Webster's Third New International Dictionary 2570 (2002). Indeed, "waiver" is commonly used to describe the post-dispute settlement or release of claims. *See, e.g., Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 426-27 (1998) (discussing that the general statutory prohibition on the waiver of ADEA claims established by the OWBPA applies to the post-dispute settlement or release of such claims).

By the same token, nothing in the text of § 825.220 indicates that the waiver prohibition protects only substantive FMLA rights and not the proscriptive FMLA rights to be free from discrimination and retaliation. Section 825.220 begins with the question, "How are employees protected who request leave *or otherwise assert FMLA rights*?" 29 C.F.R. § 825.220 (emphasis added). The section immediately preceding the anti-waiver provision explicitly recognizes that employers may not discriminate or retaliate against employees who take FMLA leave. *Id.* § 825.220(c) (explaining, for example, that "employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions"). The regulation therefore recognizes that the FMLA protects a set of rights beyond the substantive right to take twelve weeks of leave, including the proscriptive rights to be free from discrimination and retaliation for the exercise of substantive FMLA rights. Thus, because an employee who seeks redress for an employer's FMLA-related

discrimination or retaliation is "otherwise assert[ing] FMLA rights," *id.* § 825.220, she is asserting "rights under [the] FMLA" that cannot be waived, *id.* § 825.220(d). This accords with the FMLA's statutory text, which affords protection to substantive as well as proscriptive rights. *See supra* part II.B. It is therefore clear that the employee "rights under [the] FMLA" protected by the anti-waiver provision, 29 C.F.R. § 825.220(d), must include both (1) the right to twelve weeks of leave and to reinstatement following that leave (the substantive rights) and (2) the right to be free from FMLA-related discrimination and retaliation (the proscriptive rights).

Section 825.220(d)'s plain meaning is further confirmed by examining what the DOL said it intended the provision to mean at the time the final regulations were published. The DOL specifically considered and rejected proposed amendments that would have reflected the interpretation urged by Progress and adopted by the district court. In the "Summary of Major Comments" published with the final version of the FMLA implementing regulations, the DOL notes the concerns expressed by several large corporations and the U.S. Chamber of Commerce regarding "the 'no waiver of rights' provisions." Preamble to the Final Regulations Implementing the Family and Medical Leave Act of 1993, 60 Fed. Reg. 2180, 2218 (Jan. 6, 1995). These business interests "recommended explicit allowance of waivers and releases in connection with [the] settlement of FMLA claims and as part of a severance package (as allowed under Title VII and ADEA claims, for example)." *Id.* In response to these concerns, the DOL explained that it had "given

careful consideration to the comments . . . and . . . concluded that prohibitions against employees waiving their rights and employers inducing employees to waive their rights constitute sound public policy under the FMLA, as is also the case under other labor standards statutes such as the FLSA." *Id.* By rejecting business's suggestion that waivers and releases should be allowed in connection with the post-dispute settlement of FMLA claims, the DOL made clear that § 825.220(d) was never intended to have only prospective application.

The DOL's recognition that the FMLA's enforcement scheme is meant to parallel the FLSA's also indicates that employees may waive or release their FMLA rights with the prior approval of the DOL or a court. *See id.* In accepting the parallel between the FMLA and the FLSA, the DOL recognized that Congress intended for the FMLA to provide employee protections similar to those provided by the FLSA. *See* 29 U.S.C. §§ 216(b)-(c), 2617(a)-(b); *see also infra* part II.C.3. If the DOL had adopted business's recommendation of incorporating Title VII and ADEA rules on waiver into the FMLA regulations, this would have indicated acceptance of an enforcement scheme in which FMLA claims could be settled or released without agency or court approval. The DOL, however, rejected the Title VII/ADEA approach by analogizing the FMLA's enforcement scheme to that of the FLSA. *See* Preamble to the Final Regulations Implementing the Family and Medical Leave Act of 1993, 60 Fed. Reg. at 2218. The rights guaranteed by the FLSA cannot be waived or settled without prior DOL or court approval. *See Barrentine v. Ark.-Best Freight Sys.*,

Inc., 450 U.S. 728, 740, 745 (1981); *D.A. Schulte, Inc. v. Gangi*, 328 U.S. 108, 114-16 (1946); 29 U.S.C. § 216(b)-(c). Thus, the DOL — "the agency charged with administering" the FMLA, *Deaton*, 332 F.3d at 708 — has acknowledged that Congress intended for the restrictions imposed on the settlement of FLSA claims to be duplicated in the FMLA's regulatory scheme. *See* 29 U.S.C. §§ 216(b)-(c), 2617(a)-(b); *see also infra* part II.C.3.

We therefore hold that, in the absence of prior approval of the DOL or a court, 29 C.F.R. § 825.220(d) bars the waiver of both substantive and proscriptive FMLA rights. This is the case regardless of whether the waiver is executed before or after the employer commits the FMLA violation.

b.

We pause to point out that the district court's reliance on the Fifth Circuit's decision in *Faris* was misplaced. The court in that case asserted that a "plain reading" of § 825.220(d) led to the conclusion that the regulation prohibits the "prospective waiver of [substantive] rights, not the post-dispute settlement of claims" alleging retaliation. *Faris*, 332 F.3d at 321. And while the court in *Faris* did not find it "necessarily dispositive that post-dispute waiver is allowed" under Title VII and the ADEA, the waiver doctrines from those statutes were considered "highly persuasive" because the court could think of "no good reason" to treat FMLA waivers any differently. *Id.* at 321 22. As a result, the *Faris* court (like the district court here) concluded that § 825.220(d)'s prohibition does not apply to (1) the retrospective waiver or

release of FMLA claims or (2) any waiver or release of a claim that an employer has discriminated or retaliated against an employee for exercising her substantive FMLA rights. Again, we conclude that § 825.220(d) plainly prohibits the waiver or release of FMLA claims (unless there is DOL or court approval), and we therefore disagree with the Fifth Circuit's analysis. The definitions and common usage of the verb "waive," the plain meaning and context of § 825.220(d), and the DOL's own understanding of the regulation at the time of its adoption all point to the same conclusion: that § 825.220(d) does not make a distinction between (1) prospective and retrospective waivers or (2) the substantive and proscriptive rights guaranteed to every employee covered by the FMLA. From our discussion above, it is likewise clear that the DOL intended, by noting the parallels between the FMLA and the FLSA, to treat waivers under the FMLA differently from waivers under Title VII and the ADEA. In taking this course, the DOL was simply following the statutory text and congressional intent. *See infra* part II.C.3.

c.

The district court, to support its holding that § 825.220(d) does not bar the release of most FMLA claims, suggested that a contrary ruling would cast doubt on our decision in *O'Neil v. Hilton Head Hospital*, 115 F.3d 272 (4th Cir. 1997). In *O'Neil* we held that a general arbitration clause in an employment agreement applied to claims asserted under the FMLA. *Id.* at 273, 276. However, agreeing to submit a claim to arbitration is entirely different from agreeing to waive it. An agreement to arbitrate

preserves the claim; the agreement simply shifts the forum for resolving the claim from a court to an arbitration setting. *O'Neil*, in short, has no bearing on the proper interpretation of § 825.220(d).

d.

In addition to defending the district court's reasoning, Progress argues that summary judgment is appropriate because Taylor ratified the release of her FMLA claims by retaining the consideration she received in exchange for executing the general release. We disagree. Because FMLA claims are not waivable by agreement, neither are they waivable by ratification. *See Bluitt v. Eval Co. of Am.*, 3 F. Supp. 2d 761, 764 n.1 (S.D. Tex. 1998); *see also Oubre*, 522 U.S. at 426 27. Section 825.220(d) provides that "[e]mployees cannot waive . . . their rights under [the] FMLA," and it makes no exception for waiver by ratification. We take no position on the effect our decision today might have on the continuing validity of the release with respect to non-FMLA claims, but we note that the release contains a severability clause. Moreover, in future proceedings the district court "may need to inquire whether the employer has claims for restitution, recoupment, or setoff against the employee." *Oubre*, 522 U.S. at 428. These questions, which "may be complex [if] a release is effective as to some claims but not as to" others, are not before us today. *Id.*

3.

We finally reach the question of whether § 825.220(d) satisfies *Chevron*'s step two; here we ask

whether the regulation is "based on a permissible construction" of the FMLA. 467 U.S. at 843. Congress directed the Secretary of Labor to issue regulations "necessary to carry out" the Act, 29 U.S.C. § 2654, and "[t]he Secretary's judgment that a particular regulation fits within this statutory constraint must be given considerable weight," *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 86 (2002). Nevertheless, a regulation cannot be upheld if it is "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844.

Progress contends that if we conclude (as we just have) that the regulation bars enforcement of the release, then the regulation itself must be deemed unenforceable. First, Progress argues that a regulation barring the waiver or release of claims is inconsistent with the general public policy favoring settlement. Second, Progress argues that congressional silence on the issue of waiver demonstrates an intent not to regulate the waiver or release of FMLA claims. Third, Progress argues that a regulation entirely prohibiting the waiver or release of claims would be arbitrary and therefore invalid under *Chevron*.

Progress's first argument, pressing general public policy concerns, is misplaced because our inquiry under *Chevron*'s step two does not focus on whether the regulatory prohibition of FMLA waivers is advisable as a policy matter. Given the DOL's interpretive regulation, we cannot "simply impose [our] own construction on the statute, as would be necessary in the absence of an administrative interpretation." *Chevron*, 467 U.S. at 843 (footnote

omitted). Rather, we must decide whether 29 C.F.R. § 825.220(d) is "based on a permissible construction" of the FMLA or whether the regulation is instead "manifestly contrary to the statute." *Chevron*, 467 U.S. at 843-44. We agree with Progress that there is a general public policy favoring the post-dispute settlement of claims. However, because the FMLA's language, structure, and the congressional intent behind its enactment are clear (as we demonstrate below), the general policy favoring settlement has no place in our *Chevron* step two analysis of whether the DOL's implementing regulations are based on a permissible construction of the statute. *See Cent. Bank v. First Interstate Bank*, 511 U.S. 164, 188 (1994).

We also reject Progress's second argument that Congress's silence on the question of waiver should be interpreted as indicating an intent to allow the waiver or release of FMLA claims. We do so because "inferences from congressional silence, in the context of administrative law, are often treacherous." *EEOC v. Seafarers Int'l Union*, 394 F.3d 197, 202 (4th Cir. 2005) (internal quotation marks omitted); *see also Brown v. Gardner*, 513 U.S. 115, 121 (1994) (casting considerable doubt on using congressional silence to interpret a statute).

As for Progress's third argument — that a complete prohibition on the waiver or release of FMLA claims would be arbitrary — we have already explained that § 825.220(d) allows an employee to waive FMLA rights with the prior approval of the DOL or a court. *See supra* part II.C.2.a. In promulgating the implementing regulations, the DOL explicitly

analogized the FMLA to "other labor standards statutes such as the FLSA." Preamble to the Final Regulations Implementing the Family and Medical Leave Act of 1993, 60 Fed. Reg. at 2218. The agency charged with administering the statute thus concluded that the FMLA was (and was intended to be) more similar to the FLSA than to employment discrimination statutes such as Title VII, and the agency (the DOL) therefore adopted a standard governing FMLA waivers that tracks the standard governing FLSA waivers. The DOL's approach is consistent with congressional intent and the statutory text because Congress indicated that the FMLA was to be implemented in the same way as the FLSA. *See, e.g.*, S. Rep. No. 103-3, at 35 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 37 (explaining that the FMLA's "enforcement scheme is modeled on the enforcement scheme of the FLSA" and that "[t]he relief provided in FMLA also parallels the provisions of the FLSA"); *see also Arban v. W. Publ'g Corp.*, 345 F.3d 390, 407-08 (6th Cir. 2003) (explaining the strong link between the remedial provisions of the FMLA and the FLSA); *Diaz*, 131 F.3d at 712-13 (distinguishing the FMLA from employment discrimination statutes and likening it to other statutes, such as the FLSA, which "set substantive floors").

Again, the Supreme Court has consistently held that the rights guaranteed by the FLSA cannot be waived by private agreement between employer and employee. *See Barrentine*, 450 U.S. at 740, 745; *Gangi*, 328 U.S. at 114-16. Claims for FLSA violations can, of course, be settled when the settlement is supervised by the DOL or a court. The

DOL is statutorily authorized to supervise the settlement of claims for employer violations of §§ 206 and 207 of the FLSA (minimum wage and maximum hour laws), 29 U.S.C. § 216(c), and the FMLA instructs the DOL to "receive, investigate, and attempt to resolve complaints of [FMLA] violations . . . *in the same manner* that the [DOL] receives, investigates, and attempts to resolve complaints of violations of sections 206 and 207" of the FLSA, *id.* § 2617(b)(1) (emphasis added). The DOL "attempts to resolve complaints of violations of [FLSA] sections 206 and 207," *id.*, when it "supervise[s] the payment of . . . unpaid minimum wages or . . . unpaid overtime compensation" under FLSA §§ 206 or 207, a payment which, if accepted by an employee, "constitute[s] a waiver" of the employee's FLSA claim, *id.* § 216(c). Likewise, the DOL "attempt[s] to resolve complaints of [FMLA] violations . . . in the same manner that [it] . . . attempts to resolve complaints of [FLSA] violations," *id.* § 2617(b)(1), when it supervises the settlement of an employee's FMLA claim. In other words, the DOL has *statutory* authority to supervise and approve the settlement and waiver (or release) of FMLA claims. Judicial authority to supervise the settlement of both FLSA and FMLA claims is implicit in both labor standards statutes by virtue of the statutory grant of "Federal or State court" jurisdiction to hear and determine such claims. *Id.* §§ 216(b) (FLSA), 2617(a)(2) (FMLA). Thus, Progress's third argument that 29 C.F.R. § 825.220(d) is arbitrary fails because the regulation must be construed to allow the waiver or release of FMLA claims with prior DOL or court approval.

Moreover, the regulation is entirely consistent with

the statute. The FMLA was enacted to set a minimum labor standard for family and medical leave, *see* 29 U.S.C. § 2601, and was analogized to child labor and occupational safety laws as well as the FLSA, *see* H.R. Rep. No. 103-8, pt. 1, at 21-22 (1993); S. Rep. No. 103-3, at 4-5, *reprinted in* 1993 U.S.C.C.A.N. 3, 6-7. FMLA's minimum standard was justified by a concern that middle- and low-income workers should not be forced to choose between keeping their jobs and quitting to deal with pressing medical or family care needs. *See* 29 U.S.C. § 2601(a)(3); S. Rep. No. 103-3, at 7-12, *reprinted in* 1993 U.S.C.C.A.N. 3, 10-14. Without a minimum leave standard, the "minority of employers who act irresponsibly" could more easily exploit employees at the times when they are most vulnerable. S. Rep. No. 103-3, at 5, *reprinted in* 1993 U.S.C.C.A.N. 3, 7. Moreover, a uniform family and medical leave standard was regarded as necessary because it would "help all businesses maintain a minimum floor of protection for their employees without jeopardizing or decreasing their competitiveness." *Id.* at 18, *reprinted in* 1993 U.S.C.C.A.N. at 20; *see also id.* at 5, *reprinted in* 1993 U.S.C.C.A.N. at 7 ("A central reason that labor standards are necessary is to relieve the competitive pressure placed on responsible employers by employers who act irresponsibly. Federal labor standards take broad societal concerns out of the competitive process so that conscientious employers are not forced to compete with unscrupulous employers."). Section 825.220(d)'s prohibition against the waiver of rights is based on this reasoning. Without the regulation's non-waiver provision, the unscrupulous employer could systematically violate the FMLA and gain a competitive advantage by

buying out FMLA claims at a discounted rate.

In sum, we conclude that § 825.220(d) is "based on a permissible construction" of the FMLA, *Chevron*, 467 U.S. at 843, especially when we consider the Act "as a symmetrical and coherent regulatory scheme" to guarantee family and medical leave to all covered employees, *Ragsdale*, 535 U.S. at 86 (internal quotation marks omitted). The regulation is consistent with the FMLA and must be upheld because it is not "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844.

III.

Because the district court did not believe that § 825.220(d) barred the release of Taylor's FMLA claims, the court denied as futile her motion to amend her complaint to substitute CP&L as a defendant and to add an allegation that CP&L's actions were willful. In light of our holding that § 825.220(d) bars enforcement of the release with respect to the waiver of Taylor's FMLA rights, we also hold that the district court's order denying Taylor's motion to amend must be vacated. The motion should be reconsidered on remand.

IV.

We hold that, without prior DOL or court approval, 29 C.F.R. § 825.220(d) bars the prospective and retrospective waiver or release of the FMLA's substantive and proscriptive rights. We therefore reverse the district court's order granting summary judgment to Progress. We also vacate the district court's order denying Taylor's motion to amend her

complaint. The case is remanded for further proceedings.

REVERSED IN PART, VACATED IN PART, AND REMANDED

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA SOUTHERN DIVISION

NO. 7:03-CV-73-H(1)

BARBARA TAYLOR,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**ORDER**
	)	
PROGRESS ENERGY, INC.,	)	
	)	
Defendant.	)	

This matter is before the court on defendant's motion for summary judgment and plaintiff's motion to amend her complaint. The parties have briefed the issues, and the matter is ripe for adjudication. As explained below, the defendant's motion for summary judgment is granted, and plaintiff's motion to amend is denied.

STATEMENT OF THE CASE

Plaintiff Barbara Taylor is a former employee of Carolina Power & Light Company ("CP&L"). CP&L is a wholly-owned subsidiary of defendant Progress Energy, Inc. ("Progress Energy"). Ms. Taylor worked

for CP&L at the Brunswick Nuclear Plant as a data management assistant.

On May 9, 2003, plaintiff sued Progress Energy for alleged violations of the Family and Medical Leave Act ("FMLA"). On September 22, 2003, Progress Energy filed a motion for summary judgment. On November 17, 2003, plaintiff filed her opposition to the motion for summary judgment. On November 17, 2003, plaintiff also filed a motion to amend her complaint to substitute CP&L as a defendant and to add an allegation that the alleged FMLA violation was "willful." On December 15, 2003, defendant filed a joint reply and response.

STATEMENT OF THE FACTS

In May, 1993, CP&L hired the plaintiff as a document management technical aid. In April 2000, the plaintiff began experiencing pain in her right leg. In late April or early May 2000, the plaintiff's doctor placed the plaintiff on bed rest for five consecutive days due to pain and swelling in plaintiff's right leg. The doctor then ordered more tests in order to determine the cause of the pain and swelling. Taylor Aff. ¶¶ 3-5.

The plaintiff returned to work. She informed the CP&L human resources representative that she had been out of work for five days due to a medical condition and that she would need to be out of work for certain heart tests. Plaintiff contends that she asked about taking FMLA leave, but that the CP&L human resources representative advised her that she did not qualify for FMLA leave. Taylor Aff. ¶ 6.

According to the plaintiff, she continued to miss some work in June, July, and August 2000 due to her medical condition, but CP&L refused to classify the leave as FMLA leave. Taylor Aff. ¶¶ 7-8. In October 2000, plaintiff contends she received a written warning about her attendance. Taylor Aff. ¶ 9. Again in November and December 2000, plaintiff missed work due to her medical condition. Taylor Aff. ¶¶ 10-11.

In February 2001, plaintiff received her 2000 performance evaluation. She received a poor productivity evaluation due to health-related absences, and was told she would only receive a 1% or 2% pay raise. Taylor Aff. ¶ 12.

In March 2001, the CP&L department managers and supervisors informed plaintiff's department that some employees were going to be laid off. The plaintiff was advised that employees would be selected for layoff based on their performance, skills, and knowledge. Taylor Aff. ¶ 13.

Plaintiff was concerned that her 2000 performance review would adversely impact her in connection with a possible lay off. She spoke with an unidentified representative of the United States Department of Labor ("USDOL") and claims she was told that her absences could have qualified for FMLA leave. The unidentified USDOL representative also told plaintiff that FMLA qualified leave cannot be counted against an employee in performance evaluations or in raise determinations. Taylor Aff. ¶ 14.

Plaintiff then spoke with the CP&L human resources department about the information she received from the USDOL. One human resources representative told plaintiff she would look into the matter concerning FMLA leave and get back with her. However, plaintiff never heard back from her. Taylor Aff. ¶ 15. The plaintiff then went back to the original CP&L human resources representative with whom she had been dealing. Plaintiff asked that her time be recoded to reflect FMLA leave, that her performance evaluation be corrected, and that her raise be adjusted. The representative denied these requests. Taylor Aff. ¶ 16.

On May 17, 2001, plaintiff was advised that her employment with CP&L was being terminated pursuant to a reduction in force. Ahearn Aff. ¶ 4; Taylor Aff. ¶ 17. CP&L advised the plaintiff that she was eligible for certain benefits under a CP&L Transition Plan. Specifically, if the plaintiff executed a general release within a 45-day period, then she would receive, among other things, transition pay in the amount of $11,718. Ahearn Aff. ¶ 5. CP&L provided plaintiff a number of documents to review, including a document titled "General Release & Severance Agreement." Taylor Aff. ¶ 17. This release states in part:

> 1. **SEVERANCE**. In consideration for signing this **GENERAL RELEASE**, CP&L agrees to pay Employee severance benefits in accordance with the Carolina Power & Light Amended and Restated Transition Pay and Benefit Plan ("Plan").

2. GENERAL RELEASE OF CLAIMS. IN CONSIDERATION OF SEVERANCE PAYMENTS MADE BY THE COMPANY, EMPLOYEE HEREBY RELEASES CP&L, ITS PARENT, SUBSIDIARIES AND AFFILIATES, AND ITS PAST, PRESENT AND FUTURE PREDECESSORS, SUCCESSORS, ASSIGNS, OFFICERS, DIRECTORS, EMPLOYEES, AGENTS, EMPLOYEE BENEFITS PLANS AND PLAN ADMINISTRATORS FROM ALL CLAIMS AND WAIVES ALL RIGHTS EMPLOYEE MAY HAVE OR CLAIM TO HAVE RELATING TO EMPLOYEE'S EMPLOYMENT WITH CP&L, ITS SUBSIDIARIES AND AFFILIATES, OR EMPLOYEE'S SEPARATION THEREFROM, arising from events which have occurred up to the date Employee executes this General Release, including but not limited to, claims, whether previously known or later discovered, for relief, including but not limited to, front pay, back pay, compensatory damages, punitive damages, injunctive relief, attorneys' fees and costs or any other remedy, arising under: (i) the Age Discrimination in Employment Act of 1967, as amended, ("ADEA"); (ii) the Employee Retirement Income Security Act of 1974, as amended, ("ERISA"); (iii) Title VII of

the Civil Rights Act of 1964, as amended; (iv) the Energy Reorganization Act and Atomic Energy Act, both as amended; (v) the Americans with Disabilities Act ("ADA"); (vi) any wrongful termination claim under any state or federal law (vii) claims for benefits under any employee benefit plan maintained by CP&L related to service credits or other issues; (viii) claims under the Older Workers Benefit Protection Act of 1990 ("OWBPA"); and (ix) any other federal, state or local law. Notwithstanding the above, this **GENERAL RELEASE** shall not apply to claims under the North Carolina Workers' Compensation Act or the South Carolina Workers' Compensation Law.

3. **COVENANT NOT TO SUE.** Employee further agrees not to sue CP&L, its parent, subsidiaries and affiliates, or its past, present or future predecessors, successors, assigns, officers, directors, employees, agents or employee benefit plans or plan administrators on any of the released claims or join as a party with others who may sue on any such claims. . . .

10. **REVIEW PERIOD.** Employee understands that CP&L desires that Employee have adequate time and opportunity to review and understand the consequences of entering into this **GENERAL RELEASE**. Accordingly,

Employee understands that Employee has the right and CP&L encourages Employee: (i) to consult with an attorney prior to executing this **GENERAL RELEASE, and** (ii) that Employee has at least 45 days from the Notification Date stated on the Transition Pay and Benefits Eligibility Notice within which to consider signing it. In the event that Employee does not return and execute a copy of the **GENERAL RELEASE** to CP&L within 45 days from the Notification Date, Employee understands that Employee will not be entitled to the additional transition pay benefits described in the Transition Pay and Benefit Eligibility Notice and Option A of the Amended and Restated Transition Pay and Benefits Plan.

11. **DISCLAIMER OF LIABILITY.** Employee acknowledges that this **GENERAL RELEASE** is intended to avoid all litigation relating to Employee's employment with CP&L and Employee's separation therefrom; therefore, it is not to be considered as CP&L's admission of any liability to Employee – liability which CP&L denies.

12. **ACKNOWLEDEGMENT [sic] OF UNDERSTANDING.** Employee represents that Employee has carefully read the entire **GENERAL RELEASE**, fully understand [sic] its consequences,

> and knowingly and voluntarily enter [sic] into it. Employee further certifies that neither CP&L nor any of its agents, representatives or attorneys have made any representations to Employee concerning the terms or effects of this **GENERAL RELEASE** other than those contained herein.

Release, ¶¶ 1-3, 10-12 (emphasis in original).

The plaintiff executed the Release on June 4, 2001, and returned it to CP&L. On July 20, 2001, CP&L sent the plaintiff a check in the amount of $12,064.97. This check included plaintiff's transition pay of $11,718, plus payment for holiday and vacation pay (less applicable payroll deductions). Ahearn Aff. ¶ 8.

The plaintiff never returned the money that she received. Id. On May 9, 2003, plaintiff sued Progress Energy and alleged that it violated the FMLA by failing to fully inform her of her rights and obligations under the FMLA, denying her request for FMLA leave, and terminating her employment.

ANALYSIS

I. Standard of Review

Summary judgment is appropriate pursuant to Fed. R. Civ. P. 56 when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986). The party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of

material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). Once the moving party has met its burden, the non-moving party may not rest on the allegations or denials in its pleading, Anderson, 477 U.S. at 248, but "must come forward with 'specific facts showing that there is a genuine issue for trial.'" Matsushita Elec. Indus. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (quoting Fed. R. Civ. P. 56(e)). Summary judgment is not a vehicle for the court to resolve disputed factual issues. Faircloth v. United States, 837 F. Supp. 123, 125 (E.D.N.C. 1993). Instead, a trial court reviewing a claim at the summary judgment stage should determine whether a genuine issue of material fact exists for trial. Anderson, 477 U.S. at 249. In making this determination, the court must view the evidence and the inferences drawn from the evidence in the light most favorable to the non-moving party. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962) (per curiam).

II. Analysis of the Release

Defendant contends that plaintiff knowingly and voluntarily waived her rights when she signed the Release. Thus, defendant argues that the Release bars this lawsuit. Plaintiff, however, cites 29 C.F.R. § 825.220(d) for the proposition that her rights under the FMLA are not waivable. Therefore, she argues that the Release fails as a matter of law and is not a bar to this action. Further, plaintiff contends that FMLA rights cannot be waived by ratification and so her retention of the money received pursuant to the Release does not bar her FMLA claim. Finally, plaintiff contends that even if plaintiff's FMLA rights

are waivable, plaintiff did not knowingly and voluntarily waive her FMLA rights when she signed the Release.

A. The FMLA

The FMLA entitles eligible employees to take up to 12 work weeks of unpaid leave annually for any of several reasons, including the onset of a "serious health condition." See 29 U.S.C. § 2612(a)(1)(D). The FMLA includes a certification process that employees generally must follow in order to obtain FMLA leave. 29 U.S.C. § 2613.

The FMLA provides certain substantive rights to eligible employees concerning the length of the leave, the conditions of the leave, and the employee's right upon return from leave. 29 U.S.C. §§ 2612-2614. In addition, section 2615 of the FMLA prohibits certain acts.[1] Section 2617 of the FMLA provides that

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[1] Specifically, Section 1615 is entitled "Prohibited Acts" and states:

a) Interference with rights

1) Exercise of rights

It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter.

2) Discrimination

It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter.

(b) Interference with proceedings or inquiries

It shall be unlawful for any person to discharge or in any other manner discriminate against any individual because such individual–

(1) has filed any charge, or has instituted or caused to be instituted any proceeding, under or related to this subchapter;

employees may file a civil action against their employers and seek damages and equitable relief for violations of the FMLA. See 29 U.S.C. 2617. The statute of limitations for such an action is two years. See 29 U.S.C. § 2617(c)(1). If the violation is "willful", however, the statute of limitations is three years. See 29 U.S.C. § 2617(c)(2).

The USDOL enforces the FMLA. Congress authorized the Secretary of Labor to issue regulations to carry out the FMLA. 29 U.S.C. § 2654. The Secretary of Labor subsequently enacted regulations concerning the FMLA which are found in 29 C.F.R. § 825.100 et seq.

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(2) has given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under this subchapter; or

(3) has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under this subchapter. 29 U.S.C. § 1615.

B. 29 C.F.R. 825.220 and the Release

The parties' dispute centers around the meaning of 29 C.F.R. § 825.220(d).[2] Plaintiff quotes the sentence in section 825.220(d) which states, "employees cannot waive, nor may employers induce employees to waive, their rights under the FMLA." Plaintiff then cites Bluitt v. Eval Co., 3 F. Supp.2d 761 (S.D. Tex. 1998), and Dierlam v. Wesley Jessen Corp., 222 F. Supp.2d 1052 (N.D. Ill. 2002), and argues that the waiver of plaintiff's FMLA rights set forth in the Release are unenforceable. In those two cases, each district court interpreted section 825.220(d) to bar enforcement of a general waiver of FMLA rights contained in a Settlement Agreement and General Release between an employer and a former employee. Bluitt, 3 F. Supp.2d at 763; Dierlam, 222 F. Supp.2d at 1055-56.

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[2] Section 825.220 is entitled "How are employees protected who request leave or otherwise assert FMLA rights?" It states in its entirety:

(a) The FMLA prohibits interference with an employee's rights under the law, and with legal proceedings or inquiries relating to an employee's rights. More specifically, the law contains the following employee protections:

(1) An employer is prohibited from interfering with, restraining, or denying the exercise of (or attempts to exercise) any rights provided by the Act.

(2) An employer is prohibited from discharging or in any other way discriminating against any person (whether or not an employee) for opposing or complaining about any unlawful practice under the Act.

(3) All persons (whether or not employers) are prohibited from discharging or in any other way discriminating against any person (whether or not an employee) because that person has –

(i) Filed any charge, or has instituted (or caused to be instituted) any proceeding under or related to this Act;

(ii) Given, or is about to give, any information in connection with an inquiry or proceeding relating to a right under this Act;
(iii) Testified, or is about to testify, in any inquiry or proceeding relating to a right under this Act.
(b) Any violations of the Act or of these regulations constitute interfering with, restraining, or denying the exercise of rights provided by the Act. "Interfering with" the exercise of an employee's rights would include, for example, not only refusing to authorize FMLA leave, but discouraging an employee from using such leave. It would also include manipulation by a covered employer to avoid responsibilities under FMLA, for example:
(1) transferring employees from one worksite to another for the purpose of reducing worksites, or to keep worksites, below the 50-employee threshold for employee eligibility under the Act;
(2) changing the essential functions of the job in order to preclude the taking of leave;
(3) reducing hours available to work in order to avoid employee eligibility.
(c) An employer is prohibited from discriminating against employees or prospective employees who have used FMLA leave. For example, if an employee on leave without pay would otherwise be entitled to full benefits (other than health benefits), the same benefits would be required to be provided to an employee on unpaid FMLA leave. By the same token, employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can FMLA leave be counted under "no fault" attendance policies.
(d) Employees cannot waive, nor may employers induce employees to waive, their rights under FMLA. For example, employees (or their collective bargaining representatives) cannot "trade off" the right to take FMLA leave against some other benefit offered by the employer. This does not prevent an employee's voluntary and uncoerced acceptance (not as a condition of employment) of a "light duty" assignment while recovering from a serious health condition (see 825.702(d)). In such a circumstance the employee's right to restoration to the same or an equivalent position is available until 12 weeks have passed within the 12-month period, including all FMLA leave taken and the period of "light duty."

Defendant disagrees and relies on Faris v. Williams WPC-I, Inc., 332 F.3d 316 (5th Cir. 2003). In Faris, the United States Court of Appeals for the Fifth Circuit analyzed section 825.220(d) with respect to the enforceability of a post-termination release that a departing employee signed. The Fifth Circuit held that section 825.220(d) did not bar the enforcement of the release. Id.

The Fifth Circuit noted that the specific context of section 825.220 used the term "employee" to consistently refer to current employees, and not former employees. Id. at 320. In addition, the Fifth Circuit determined that section 825.220 prohibits prospective waiver of substantive rights under the FMLA, but does not affect post-dispute settlement of claims. Id. at 320-21. Finally, the Fifth Circuit noted that its reading of the regulation was "bolstered by public policy favoring enforcement of waivers and our knowledge that similar waivers are allowed in other regulatory contexts." Id. at 321 (collecting cases where courts enforced releases involving a variety of federal employment statutes).

This court is more persuaded by the Fifth Circuit's reasoning in Faris than by the district court opinions in Bluitt and Dierlam. This court agrees with the Fifth Circuit that section 825.220 applies only to an employee's substantive rights under the FMLA. As such it does not preclude the post-dispute

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(e) Individuals, and not merely employees, are protected from retaliation for opposing (e.g., file a complaint about) any practice which is unlawful under the Act. They are similarly protected if they oppose any practice which they reasonably believe to be a violation of the Act or regulations.
29 C.F.R. § 825.220.

settlement of a claim alleging that those substantive rights have been previously violated. What it does preclude is the prospective bargaining away of those substantive rights. For example, if an employer and employee signed a "contract" at the outset of employment in which the employee agreed to waive all of her FMLA rights in exchange for $100, then such a contract would not be enforceable.

Notably, the district court opinions fail to take into account the context of the regulatory scheme in which the disputed language in section 825.220(d) is set out. Bluitt, 3 F. Supp.2d at 763-64; Dierlam, 222 F. Supp.2d at 1055-56. The district court opinions focus on a single sentence in section 825.220(d). In contrast, the Fifth Circuit focused on the entire regulation.

Specifically, the regulation contemplates the employee's "voluntary and uncoerced acceptance" of certain assignments without the employer violating the FMLA. 29 C.F.R. § 825.220(d). Although the example in the regulation relates to a light duty assignment, the regulation's recognition of the ability of an employee to voluntarily accept such an assignment supports the notion that employees may voluntarily waive a claim to seek damages or equitable relief under the FMLA. Moreover, the question posed in the title of 29 C.F.R. § 825.220 (i.e., "How are employees protected who request leave or otherwise assert FMLA rights?") and the text of the entire regulation do not suggest that the USDOL sought to bar all releases of claims for damages or equitable relief. If the USDOL intended to bar all releases of all such claims, it could have used language to make that clear. It did not.

Additionally, the interpretation advanced by plaintiff would render the FMLA unique in the area of federal employment law. As the Fifth Circuit noted, such a reading of the regulation is inconsistent with other federal statutes in which the enforceability of releases of post-dispute federal employment claims has long been recognized. Faris, 332 F.2d at 316, 321-22 (noting that waivers of the right to bring suit under the Age Discrimination in Employment Act ("ADEA") and Title VII claims are enforceable, and observing that there is no good reason to treat FMLA claims differently); see also Alexander v. Gardner-Denver Co., 415 U.S. 36, 51 n.15 (1974) (discussing a knowing and voluntary waiver of a Title VII claim); Adams v. Moore Business Forms, Inc., 224 F.3d 324, 327-30 (4th Cir. 2000) (discussing requirements for valid waivers under the ADEA).

The plaintiff's reading of section 825.220(d) also would cast doubt upon the Fourth Circuit's holding in O'Neil v. Hilton Head Hosp., 115 F.3d 272, 273-76 (4th Cir. 1997). In O'Neil, the plaintiff alleged that her former employer violated the FMLA when it discharged her from employment. The former employee sued. The employer moved to stay the action pending arbitration. The Fourth Circuit enforced an employment agreement in which the employer and employee agreed to submit all employment disputes to arbitration. The arbitration clause did not mention any specific claims that would be subject to arbitration. Nevertheless, the Fourth Circuit rejected the employee's argument that her FMLA claim was not subject to arbitration. Id. Although the Fourth Circuit did not cite section

825.220(d), it is difficult to reconcile plaintiff's proposed reading of section 825.220(d) with the holding in O'Neil.

Finally, serious issues of judicial economy would be raised if the court adopted plaintiff's interpretation of section 825.220(d). Plaintiff's position would eviscerate the ability of parties to settle any FMLA disputes. The plaintiff's interpretation would result in employers being reluctant to offer reasonable settlement amounts because the accompanying releases would be unenforceable. Indeed, it would appear that the only way any FMLA claim could ever be settled would be for the plaintiff to file suit and for the parties to induce the court to sign a consent judgment. This court refuses to adopt that reading of 29 C.F.R. § 825.220. Accordingly, this court need not address defendant's argument that if section 825.220(d) bars all releases of all FMLA claims, then the regulation is invalid under Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 844 (1984) (explaining that a regulation is invalid if it is "arbitrary, capricious, or manifestly contrary to the statute"); Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81, 86 (2002) (quoting the Chevron standard in invalidating a regulation promulgated under the FMLA).

C. The validity of the release

Having determined that the release is not invalid under 29 C.F.R. § 825.220, this court must now address whether the release was knowing and voluntary. Plaintiff asserts that this court should evaluate the enforceability of Release under a

"totality of the circumstances" test, citing Melanson v. Browning-Ferris Indus., 281 F.3d 272, 276 (1st Cir. 2002). Plaintiff further argues that the waiver was not knowing or voluntary.

As the defendant correctly notes, the Fourth Circuit has rejected the "totality of the circumstances" test. Instead, the enforceability of a release of a federal employment discrimination claim is analyzed "under ordinary contract principles." O'Shea v. Commercial Credit Corp., 930 F.2d 358, 362 (4th Cir. 1991); see also Kendall v. City of Chesapeake, Va., 174 F.3d 437, 441 n.1 (4th Cir. 1999) (observing that the rationale of O'Shea remains valid despite the overturning of its precise holding by subsequent congressional changes to the ADEA).

North Carolina contract principles apply. Under North Carolina law, a "general release" releases all claims between the parties. "Under our law a comprehensively phrased 'general release,' in the absence of proof of a contrary intent, is usually held to discharge all and sundry claims between the parties." McGladrey, Hendrickson & Pullen v. Syntek Finance Corp., 92 N.C. App. 708, 710-11, 375 S.E.2d 689, 691 (1989) (citing Merrimon v. The Postal Telegraph-Cable Co., 207 N.C. 101, 176 S.E. 246 (1934)). Such a release "is subject to avoidance by a showing that its execution resulted from fraud or mutual mistake." Sykes v. Keiltex Indus., 123 N.C. App. 482, 485, 473 S.E.2d 341, 344 (1996).

Plaintiff has not alleged fraud or facts which could in any way constitute fraud. As for mutual mistake, a "mutual mistake" is a "mistake common to all the parties to a written instrument." Id. at 486,

473 S.E.2d at 344 (citation omitted). Here plaintiff has only provided evidence that she was mistaken about the effect of the release, not the defendant. Taylor Aff. ¶¶ 19-22. Such evidence is insufficient to establish a mutual mistake. Sykes, 123 N.C. App. 486-87, 473 S.E.2d at 344.

In any event, even if this court were to apply the "totality of the circumstances" test to the Release, it would be enforceable. Plaintiff's affidavit makes clear that she was aware of a potential FMLA dispute with defendant before signing this release. See Taylor Aff. ¶¶ 14-16 (plaintiff discussed her FMLA rights with representatives of USDOL and CP&L human resources). Given the breadth of the language in the Release and that the Release states that the plaintiff was advised to consult with an attorney, plaintiff has not produced evidence which raises a genuine issue of material fact as to whether the Release was knowing and voluntary. Accordingly, the defendant's motion for summary judgment is granted.

III. The Motion to Amend

The plaintiff has moved to amend her complaint to substitute CP&L as a defendant and to add an allegation that CP&L's violation of the FMLA was "willful." Generally, under Fed. R. Civ. P. 15(a), a trial court should grant a motion to amend where justice so requires. Foman v. Davis, 371 U.S. 178, 182 (1962). A trial court, however, does have the discretion to deny a motion to amend where the amendment would be futile. Id.; see also New Beckley Mining Corp. v. International Union, 18 F.3d 1161, 1164 (4th Cir. 1994). In considering whether a motion to amend is futile, a court applies the same standard

that it applies in considering a motion to dismiss under Rule (12)(b)(6). Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc., 974 F.2d 502, 506 (4th Cir. 1992) (denying motion to amend; claims in proposed amended complaint failed to state a claim because they were barred by the applicable statute of limitations).

Given the breadth of the Release, the plaintiff's motion to amend is futile. Even if CP&L were substituted as a defendant, the Release would bar the claim against CP&L. Accordingly, the motion to amend is denied.

CONCLUSION

For the foregoing reasons, the defendant's motion for summary judgment is GRANTED and the plaintiff's motion to amend her complaint is DENIED. The clerk is directed to close this case.

This 22 day of March, 2004.

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MALCOLM J. HOWARD

United States District Judge

At Greenville, NC

JD

APPENDIX D

FILED: August 24, 2007

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 04-1525
(CA-03-73-7-H)

BARBARA TAYLOR,

Plaintiff - Appellant,

versus

PROGRESS ENERGY, INCORPORATED,

Defendant - Appellee.

NATIONAL EMPLOYMENT LAWYERS' ASSOCIATION; NORTH CAROLINA ACADEMY OF TRIAL LAWYERS;

Amici Supporting Appellant,

EQUAL EMPLOYMENT ADVISORY COUNCIL; SOCIETY FOR HUMAN RESOURCE MANAGEMENT; CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; ELAINE CHAO, Secretary of Labor,

Amici Supporting Appellee,

ORDER

Appellee has filed a petition for rehearing en banc of this court's decision of July 3, 2007. Appellant has filed an answer in opposition.

The Court grants amici motions for leave to file briefs in response to the petition for rehearing en banc and accepts the proposed briefs. As no poll was requested on the petition for rehearing en banc, the Court denies the petition.

Entered at the direction of Judge Michael with the concurrence of Judge Duncan and Judge Payne.

For the Court

/s/ Patricia S. Connor

Clerk

APPENDIX E

FILED: June 14, 2006

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 04-1525
(CA-03-73-7-H)

BARBARA TAYLOR,

Plaintiff - Appellant,

versus

PROGRESS ENERGY, INCORPORATED,

Defendant - Appellee.

NATIONAL EMPLOYMENT LAWYERS' ASSOCIATION; NORTH CAROLINA ACADEMY OF TRIAL LAWYERS;

Amici Supporting Appellant,

EQUAL EMPLOYMENT ADVISORY COUNCIL; SOCIETY FOR HUMAN RESOURCE MANAGEMENT; CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA;

Amici Curiae,

ELAINE CHAO, Secretary of Labor,

Amicus Supporting Appellee.

ORDER

Appellee has filed a petition for rehearing en banc of this court's decision of July 20, 2005. Appellant has filed an answer.

As no poll was requested on the petition for rehearing en banc, the court denies the petition. (Judge Widener, being disqualified, did not participate in any consideration of the petition.)

Panel rehearing of this case is granted at the direction of the court. The original judgment and opinion of the court are vacated.

Entered at the direction of Judge Michael with the concurrence of Judge Duncan and Judge Payne.

For the Court

/s/ Patricia S. Connor

Clerk

APPENDIX F

THE FAMILY AND MEDICAL LEAVE ACT
29 USCS §§ 2601; 2611-2612; 2614-2617; 2654

TITLE 29. LABOR
CHAPTER 28. FAMILY AND MEDICAL LEAVE

§ 2601. Findings and purposes

(a) Findings. Congress finds that--

(1) the number of single-parent households and two-parent households in which the single parent or both parents work is increasing significantly;

(2) it is important for the development of children and the family unit that fathers and mothers be able to participate in early childrearing and the care of family members who have serious health conditions;

(3) the lack of employment policies to accommodate working parents can force individuals to choose between job security and parenting;

(4) there is inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods;

(5) due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men; and

(6) employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender.

(b) Purposes. It is the purpose of this Act--

(1) to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity;

(2) to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition;

(3) to accomplish the purposes described in paragraphs (1) and (2) in a manner that accommodates the legitimate interests of employers;

(4) to accomplish the purposes described in paragraphs (1) and (2) in a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment [USCS, Constitution, Amendment 14, § 1] minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender-neutral basis; and

(5) to promote the goal of equal employment opportunity for women and men, pursuant to such clause.

§ 2611. Definitions

As used in this title [29 USCS § § 2611 et seq.]:

(1) Commerce. The terms "commerce" and "industry or activity affecting commerce" mean any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct

commerce or the free flow of commerce, and include "commerce" and any "industry affecting commerce", as defined in paragraphs (1) and (3) of section 501 of the Labor Management Relations Act, 1947 (29 U.S.C. 142 (1) and (3)).

(2) Eligible employee.

(A) In general. The term "eligible employee" means an employee who has been employed--

(i) for at least 12 months by the employer with respect to whom leave is requested under section 102 [29 USCS § 2612]; and

(ii) for at least 1,250 hours of service with such employer during the previous 12-month period.

(B) Exclusions. The term "eligible employee" does not include--

(i) any Federal officer or employee covered under subchapter V of chapter 63 of title 5, United States Code [5 USCS § § 6381 et seq.] (as added by title II of this Act); or

(ii) any employee of an employer who is employed at a worksite at which such employer employs less than 50 employees if the total number of employees employed by that employer within 75 miles of that worksite is less than 50.

(C) Determination. For purposes of determining whether an employee meets the hours of service requirement specified in subparagraph (A)(ii), the legal standards established under section 7 of the Fair Labor Standards Act of 1938 (29 U.S.C. 207) shall apply.

(3) Employ; employee; State. The terms "employ", "employee", and "State" have the same meanings given such terms in subsections (c), (e), and (g) of section 3 of the Fair Labor Standards Act of 1938 (29 U.S.C. 203 (c), (e), and (g)).

(4) Employer.

(A) In general. The term "employer"--

(i) means any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year;

(ii) includes--

(I) any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer; and

(II) any successor in interest of an employer;

(iii) includes any "public agency", as defined in section 3(x) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(x)); and

(iv) includes the General Accounting Office [Government Accountability Office] and the Library of Congress.

(B) Public agency. For purposes of subparagraph (A)(iii), a public agency shall be considered to be a person engaged in commerce or in an industry or activity affecting commerce.

(5) Employment benefits. The term "employment benefits" means all benefits provided or made available to employees by an employer, including group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits, and pensions, regardless of whether such benefits are provided by a practice or written policy of an employer or through an "employee benefit plan", as defined in section 3(3) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(3)).

(6) Health care provider. The term "health care provider" means-

(A) a doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or

(B) any other person determined by the Secretary to be capable of providing health care services.

(7) Parent. The term "parent" means the biological parent of an employee or an individual who stood in loco parentis to an employee when the employee was a son or daughter.

(8) Person. The term "person" has the same meaning given such term in section 3(a) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(a)).

(9) Reduced leave schedule. The term "reduced leave schedule" means a leave schedule that reduces the usual number of hours per workweek, or hours per workday, of an employee.

(10) Secretary. The term "Secretary" means the Secretary of Labor.

(11) Serious health condition. The term "serious health condition" means an illness, injury, impairment, or physical or mental condition that involves--

(A) inpatient care in a hospital, hospice, or residential medical care facility; or

(B) continuing treatment by a health care provider.

(12) Son or daughter. The term "son or daughter" means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is-

(A) under 18 years of age; or

(B) 18 years of age or older and incapable of self-care because of a mental or physical disability.

(13) Spouse. The term "spouse" means a husband or wife, as the case may be.

§ 2612. Leave requirement

(a) In general.

(1) Entitlement to leave. Subject to section 103 [29 USCS § 2613], an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:

(A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.

(B) Because of the placement of a son or daughter with the employee for adoption or foster care.

(C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.

(D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

(2) Expiration of entitlement. The entitlement to leave under subparagraphs (A) and (B) of paragraph (1) for a birth or placement of a son or daughter shall expire at the end of the 12-month period beginning on the date of such birth or placement.

(b) Leave taken intermittently or on a reduced leave schedule.

(1) In general. Leave under subparagraph (A) or (B) of subsection (a)(1) shall not be taken by an employee intermittently or on a reduced leave

schedule unless the employee and the employer of the employee agree otherwise. Subject to paragraph (2), subsection (e)(2), and section 103(b)(5) [29 USCS § 2613(b)(5)], leave under subparagraph (C) or (D) of subsection (a)(1) may be taken intermittently or on a reduced leave schedule when medically necessary. The taking of leave intermittently or on a reduced leave schedule pursuant to this paragraph shall not result in a reduction in the total amount of leave to which the employee is entitled under subsection (a) beyond the amount of leave actually taken.

(2) Alternative position. If an employee requests intermittent leave, or leave on a reduced leave schedule, under subparagraph (C) or (D) of subsection (a)(1), that is foreseeable based on planned medical treatment, the employer may require such employee to transfer temporarily to an available alternative position offered by the employer for which the employee is qualified and that--

(A) has equivalent pay and benefits; and

(B) better accommodates recurring periods of leave than the regular employment position of the employee.

(c) Unpaid leave permitted. Except as provided in subsection (d), leave granted under subsection (a) may consist of unpaid leave. Where an employee is otherwise exempt under regulations issued by the Secretary pursuant to section 13(a)(1) of the Fair Labor Standards Act of 1938 (29 U.S.C. 213(a)(1)), the compliance of an employer with this title [29 USCS § § 2611 et seq.] by providing unpaid leave shall not affect the exempt status of the employee under such section.

(d) Relationship to paid leave.

(1) Unpaid leave. If an employer provides paid

leave for fewer than 12 workweeks, the additional weeks of leave necessary to attain the 12 workweeks of leave required under this title [29 USCS § § 2611 et seq.] may be provided without compensation.

(2) Substitution of paid leave.

(A) In general. An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or family leave of the employee for leave provided

under subparagraph (A), (B), or (C) of subsection (a)(1) for any part of the 12-week period of such leave under such subsection.

(B) Serious health condition. An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or medical or sick leave of the employee for leave provided under subparagraph (C) or (D) of subsection (a)(1) for any part of the 12-week period of such leave under such subsection, except that nothing in this title [29 USCS § § 2611 et seq.] shall require an employer to provide paid sick leave or paid medical leave in any situation in which such employer would not normally provide any such paid leave.

(c) Foreseeable leave.

(1) Requirement of notice. In any case in which the necessity for leave under subparagraph (A) or (B) of subsection (a)(1) is foreseeable based on an expected birth or placement, the employee shall provide the employer with not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave under such subparagraph, except that if the date of the birth or placement requires leave to begin in less than 30

days, the employee shall provide such notice as is practicable.

(2) Duties of employee. In any case in which the necessity for leave under subparagraph (C) or (D) of subsection (a)(1) is foreseeable based on planned medical treatment, the employee--

(A) shall make a reasonable effort to schedule the treatment so as not to disrupt unduly the operations of the employer, subject to the approval of the health care provider of the employee or the health care provider of the son, daughter, spouse, or parent of the employee, as appropriate; and

(B) shall provide the employer with not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave under such subparagraph, except that if the date of the treatment requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable.

(f) Spouses employed by the same employer. In any case in which a husband and wife entitled to leave under subsection (a) are employed by the same employer, the aggregate number of workweeks of leave to which both may be entitled may be limited to 12 workweeks during any 12-month period, if such leave is taken--

(1) under subparagraph (A) or (B) of subsection (a)(1); or

(2) to care for a sick parent under subparagraph (C) of such subsection.

§ 2614. Employment and benefits protection

(a) Restoration to position.

(1) In general. Except as provided in

subsection (b), any eligible employee who takes leave under section 102 [29 USCS § 2612] for the intended purpose of the leave shall be entitled, on return from such leave--

(A) to be restored by the employer to the position of employment held by the employee when the leave commenced; or

(B) to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.

(2) Loss of benefits. The taking of leave under section 102 [29 USCS § 2612] shall not result in the loss of any employment benefit accrued prior to the date on which the leave commenced.

(3) Limitations. Nothing in this section shall be construed to entitle any restored employee to--

(A) the accrual of any seniority or employment benefits during any period of leave; or

(B) any right, benefit, or position of employment other than any right, benefit, or position to which the employee would have been entitled had the employee not taken the leave.

(4) Certification. As a condition of restoration under paragraph (1) for an employee who has taken leave under section 102(a)(1)(D) [29 USCS § 2612(a)(1)(D)], the employer may have a uniformly applied practice or policy that requires each such employee to receive certification from the health care provider of the employee that the employee is able to resume work, except that nothing in this paragraph shall supersede a valid State or local law or a collective bargaining agreement that governs the return to work of such employees.

(5) Construction. Nothing in this subsection shall be construed to prohibit an employer from

requiring an employee on leave under section 102 [29 USCS § 2612] to report periodically to the employer on the status and intention of the employee to return to work.

(b) Exemption concerning certain highly compensated employees.

(1) Denial of restoration. An employer may deny restoration under subsection (a) to any eligible employee described in paragraph (2) if--

(A) such denial is necessary to prevent substantial and grievous economic injury to the operations of the employer;

(B) the employer notifies the employee of the intent of the employer to deny restoration on such basis at the time the employer determines that such injury would occur; and

(C) in any case in which the leave has commenced, the employee elects not to return to employment after receiving such notice.

(2) Affected employees. An eligible employee described in paragraph (1) is a salaried eligible employee who is among the highest paid 10 percent of the employees employed by the employer within 75 miles of the facility at which the employee is employed.

(c) Maintenance of health benefits.

(1) Coverage. Except as provided in paragraph (2), during any period that an eligible employee takes leave under section 102 [29 USCS § 2612], the employer shall maintain coverage under any "group health plan" (as defined in section 5000(b)(1) of the Internal Revenue Code of 1986 [26 USCS § 5000(b)(1)]) for the duration of such leave at the level and under the conditions coverage would have been provided if the employee had continued in

employment continuously for the duration of such leave.

(2) Failure to return from leave. The employer may recover the premium that the employer paid for maintaining coverage for the employee under such group health plan during any period of unpaid leave under section 102 [29 USCS § 2612] if--

(A) the employee fails to return from leave under section 102 [29 USCS § 2612] after the period of leave to which the employee is entitled has expired; and

(B) the employee fails to return to work for a reason other than--

(i) the continuation, recurrence, or onset of a serious health condition that entitles the employee to leave under subparagraph (C) or (D) of section 102(a)(1) [29 USCS § 2612(a)(1)]; or

(ii) other circumstances beyond the control of the employee.

(3) Certification.

(A) Issuance. An employer may require that a claim that an employee is unable to return to work because of the continuation, recurrence, or onset of the serious health condition described in paragraph (2)(B)(i) be supported by-

(i) a certification issued by the health care provider of the son, daughter, spouse, or parent of the employee, as appropriate, in the case of an employee unable to return to work because of a condition specified in section 102(a)(1)(C) [29 USCS § 2612(a)(1)(C)]; or

(ii) a certification issued by the health care provider of the eligible employee, in the case of an employee unable to return to work because of a condition specified in section 102(a)(1)(D) [29 USCS §

2612(a)(1)(D)].

(B) Copy. The employee shall provide, in a timely manner, a copy of such certification to the employer.

(C) Sufficiency of certification.

(i) Leave due to serious health condition of employee. The certification described in subparagraph (A)(ii) shall be sufficient if the certification states that a serious health condition prevented the employee from being able to perform the functions of the position of the employee on the date that the leave of the employee expired.

(ii) Leave due to serious health condition of family member. The certification described in subparagraph (A)(i) shall be sufficient if the certification states that the employee is needed to care for the son, daughter, spouse, or parent who has a serious health condition on the date that the leave of the employee expired.

§ 2615. Prohibited acts

(a) Interference with rights.

(1) Exercise of rights. It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this title [29 USCS § § 2611 et seq.].

(2) Discrimination. It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this title [29 USCS § § 2611 et seq.].

(b) Interference with proceedings or inquiries. It shall be unlawful for any person to discharge or in any other manner discriminate against any

individual because such individual--

(1) has filed any charge, or has instituted or caused to be instituted any proceeding, under or related to this title [29 USCS § § 2611 et seq.];

(2) has given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under this title [29 USCS § § 2611 et seq.]; or

(3) has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under this title [29 USCS § § 2611 et seq.].

§ 2616. Investigative authority

(a) In general. To ensure compliance with the provisions of this title [29 USCS § § 2611 et seq.], or any regulation or order issued under this title [29 USCS § § 2611 et seq.], the Secretary shall have, subject to subsection (c), the investigative authority provided under section 11(a) of the Fair Labor Standards Act of 1938 (29 U.S.C. 211(a)).

(b) Obligation to keep and preserve records. Any employer shall make, keep, and preserve records pertaining to compliance with this title [29 USCS § § 2611 et seq.] in accordance with section 11(c) of the Fair Labor Standards Act of 1938 (29 U.S.C. 211(c)) and in accordance with regulations issued by the Secretary.

(c) Required submissions generally limited to an annual basis. The Secretary shall not under the authority of this section require any employer or any plan, fund, or program to submit to the Secretary any books or records more than once during any 12-month period, unless the Secretary has reasonable cause to believe there may exist a violation of this

title [29 USCS § § 2611 et seq.] or any regulation or order issued pursuant to this title [29 USCS § § 2611 et seq.], or is investigating a charge pursuant to section 107(b) [29 USCS § 2617(b)].

(d) Subpoena powers. For the purposes of any investigation provided for in this section, the Secretary shall have the subpoena authority provided for under section 9 of the Fair Labor Standards Act of 1938 (29 U.S.C. 209).

§ 2617. Enforcement

(a) Civil action by employees.

(1) Liability. Any employer who violates section 105 [29 USCS § 2615] shall be liable to any eligible employee affected--

(A) for damages equal to--

(i) the amount of--

(I) any wages, salary, employment benefits, or other compensation denied or lost to such employee by reason of the violation; or

(II) in a case in which wages, salary, employment benefits, or other compensation have not been denied or lost to the employee, any actual monetary losses sustained by the employee as a direct result of the violation, such as the cost of providing care, up to a sum equal to 12 weeks of wages or salary for the employee;

(ii) the interest on the amount described in clause (i) calculated at the prevailing rate; and

(iii) an additional amount as liquidated damages equal to the sum of the amount described in clause (i) and the interest described in clause (ii), except that if an employer who has violated section 105 [29 USCS § 2615] proves to the satisfaction of

the court that the act or omission which violated section 105 [29 USCS § 2615] was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of section 105 [29 USCS § 2615], such court may, in the discretion of the court, reduce the amount of the liability to the amount and interest determined under clauses (i) and (ii), respectively; and

(B) for such equitable relief as may be appropriate, including employment, reinstatement, and promotion.

(2) Right of action. An action to recover the damages or equitable relief prescribed in paragraph (1) may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of--

(A) the employees; or

(B) the employees and other employees similarly situated.

(3) Fees and costs. The court in such an action shall, in addition to any judgment awarded to the plaintiff, allow a reasonable attorney's fee, reasonable expert witness fees, and other costs of the action to be paid by the defendant.

(4) Limitations. The right provided by paragraph (2) to bring an action by or on behalf of any employee shall terminate--

(A) on the filing of a complaint by the Secretary in an action under subsection (d) in which restraint is sought of any further delay in the payment of the amount described in paragraph (1)(A) to such employee by an employer responsible under paragraph (1) for the payment; or

(B) on the filing of a complaint by the

Secretary in an action under subsection (b) in which a recovery is sought of the damages described in paragraph (1)(A) owing to an eligible employee by an employer liable under paragraph (1), unless the action described in subparagraph (A) or (B) is dismissed without prejudice on motion of the Secretary.

(b) Action by the Secretary.

(1) Administrative action. The Secretary shall receive, investigate, and attempt to resolve complaints of violations of section 105 in the same manner that the Secretary receives, investigates, and attempts to resolve complaints of violations of sections 6 and 7 of the Fair Labor Standards Act of 1938 (29 U.S.C. 206 and 207).

(2) Civil action. The Secretary may bring an action in any court of competent jurisdiction to recover the damages described in subsection (a)(1)(A).

(3) Sums recovered. Any sums recovered by the Secretary pursuant to paragraph (2) shall be held in a special deposit account and shall be paid, on order of the Secretary, directly to each employee affected. Any such sums not paid to an employee because of inability to do so within a period of 3 years shall be deposited into the Treasury of the United States as miscellaneous receipts.

(c) Limitation.

(1) In general. Except as provided in paragraph (2), an action may be brought under this section not later than 2 years after the date of the last event constituting the alleged violation for which the action is brought.

(2) Willful violation. In the case of such action brought for a willful violation of section 105 [29 USCS § 2615], such action may be brought within 3

years of the date of the last event constituting the alleged violation for which such action is brought.

(3) Commencement. In determining when an action is commenced by the Secretary under this section for the purposes of this subsection, it shall be considered to be commenced on the date when the complaint is filed.

(d) Action for injunction by Secretary. The district courts of the United States shall have jurisdiction, for cause shown, in an action brought by the Secretary--

(1) to restrain violations of section 105 [29 USCS § 2615], including the restraint of any withholding of payment of wages, salary, employment benefits, or other compensation, plus interest, found by the court to be due to eligible employees; or

(2) to award such other equitable relief as may be appropriate, including employment, reinstatement, and promotion.

(e) Solicitor of Labor. The Solicitor of Labor may appear for and represent the Secretary on any litigation brought under this section.

(f) General Accounting Office [Government Accountability Office] and Library of Congress. In the case of the General Accounting Office [Government Accountability Office] and the Library of Congress, the authority of the Secretary of Labor under this title [29 USCS § § 2611 et seq.] shall be exercised respectively by the Comptroller General of the United States and the Librarian of Congress.

§ 2654. Regulations

The Secretary of Labor shall prescribe such

regulations as are necessary to carry out title I and this title [29 USCS § § 2611 et seq., 2651 et seq.] not later than 120 days after the date of the enactment of this Act [Feb. 5, 1993]

APPENDIX G

29 CFR 825.220

§ 825.220 How are employees protected who request leave or otherwise assert FMLA rights?

(a) The FMLA prohibits interference with an employee's rights under the law, and with legal proceedings or inquiries relating to an employee's rights. More specifically, the law contains the following employee protections:

(1) An employer is prohibited from interfering with, restraining, or denying the exercise of (or attempts to exercise) any rights provided by the Act.

(2) An employer is prohibited from discharging or in any other way discriminating against any person (whether or not an employee) for opposing or complaining about any unlawful practice under the Act.

(3) All persons (whether or not employers) are prohibited from discharging or in any other way discriminating against any person (whether or not an employee) because that person has--

(i) Filed any charge, or has instituted (or caused to be instituted) any proceeding under or related to this Act;

(ii) Given, or is about to give, any information in connection with an inquiry or proceeding relating to a right under this Act;

(iii) Testified, or is about to testify, in any inquiry or proceeding relating to a right under this Act.

(b) Any violations of the Act or of these regulations constitute interfering with, restraining, or denying the exercise of rights provided by the Act.

"Interfering with" the exercise of an employee's rights would include, for example, not only refusing to authorize FMLA leave, but discouraging an employee from using such leave. It would also include manipulation by a covered employer to avoid responsibilities under FMLA, for example:

(1) transferring employees from one worksite to another for the purpose of reducing worksites, or to keep worksites, below the 50-employee threshold for employee eligibility under the Act;

(2) changing the essential functions of the job in order to preclude the taking of leave;

(3) reducing hours available to work in order to avoid employee eligibility.

(c) An employer is prohibited from discriminating against employees or prospective employees who have used FMLA leave. For example, if an employee on leave without pay would otherwise be entitled to full benefits (other than health benefits), the same benefits would be required to be provided to an employee on unpaid FMLA leave. By the same token, employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can FMLA leave be counted under "no fault" attendance policies.

(d) Employees cannot waive, nor may employers induce employees to waive, their rights under FMLA. For example, employees (or their collective bargaining representatives) cannot "trade off" the right to take FMLA leave against some other benefit offered by the employer. This does not prevent an employee's voluntary and uncoerced acceptance (not as a condition of employment) of a ``light duty" assignment while recovering from a serious health

condition (see Sec. 825.702(d)). In such a circumstance the employee's right to restoration to the same or an equivalent position is available until 12 weeks have passed within the 12-month period, including all FMLA leave taken and the period of "light duty."

(e) Individuals, and not merely employees, are protected from retaliation for opposing (e.g., file a complaint about) any practice which is unlawful under the Act. They are similarly protected if they oppose any practice which they reasonably believe to be a violation of the Act or regulations.